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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. ~~308 - 310~~
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OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

APPENDICES TO PETITIONS FOR WRITS OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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OF THE
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to the United States Court of Appeals
for the Ninth Circuit.

Appendix A

United States Court of Appeals
for the Ninth Circuit

Oleta O'Connor Yates, Henry Steinberg, Loretta Starvus Stack, Frank Efroim Spector, William Schneiderman, Al Richmond, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly, Philip Marshall Connelly and Frank Carlson, Appellants, vs. United States of America, Appellee.	No. 13,480 Mar. 17, 1955

Upon Appeals from the United States District Court for
the Southern District of California,
Central Division

Before: Stephens, Fee and Chambers, Circuit Judges

James Alger Fee, Circuit Judge:

Defendants in this criminal case were convicted by a jury upon an indictment which charged them as participants in a conspiracy to commit crimes with the specific intent of causing the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit. The trial lasted over a period of some six months, and the jury, before returning its verdicts, took six full days for deliberation. Each de-

fendant has appealed from the judgment of conviction entered pursuant to the finding of the jury. Every phase of the indictment, the trial, the instructions and the theory of the Court has been raised by motion, objection, exception and assignment of error.[1]

The impressive feature of this case is that practically every assignment of error urged in this appeal has been ruled upon by the Supreme Court of the United States in Dennis v. United States, 341 U.S. 494.[1] There the basic statute in the original form was held "inherently" constitutional and also as applied to a situation involving a similar conspiracy connected with the unlawful concert found to exist in the case at bar. In the main and concurring opinions, principles were laid down which are virtually conclusive here. The defendants, notwithstanding this positive holding, paradoxically complain that the trial court here denied their motion to take testimony on written interrogatories with respect to the impact of the

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[1]A motion for bill of particulars was made and denied, a motion to suppress evidence upon the ground that the methods whereby it was obtained were illegal, a motion to dismiss the indictment on the grounds it was barred by "res adjudicata," a motion to order government agents to desist from surveillance during the trial, a motion to investigate alleged hampering of one of defendants prior to trial were made and denied. There were motions to strike from evidence declarations of third parties on various grounds. There were several motions for mistrial, and finally there were motions for arrest of judgment. Other motions of various types were made and denied. The opinion deals specifically with certain of these motions. Generally, the discussion covers the points raised. It would extend the discussion intolerably to cover each in detail. The rulings were not erroneous.

[2]In the District Court, this case was entitled United States v. Foster, 9 F.R.D. 367. The opinion of the Court of Appeals of the Second Circuit appears as United States vs. Dennis, 183 F.2d 201. Throughout the opinion here, that case will be referred to as "Dennis" in whatever court the particular proceeding may have taken place.

Smith Act and its enforcement on First Amendment rights, and rejected an offer of proof on the ground that the Dennis decision had foreclosed any further proof of unconstitutionality on the facts then before that court.

Defendants principally contend, as they must to prevail, that the trial court here departed in the course of the trial from the mandate so laid down by the Supreme Court: A careful analysis must be made of the opinions of the highest court, the statute as then written and the indictment in that case in order to appraise the claims of error in the instant appeal.

The indictment in the Dennis case was drawn in accordance with the basic statute, which appeared as Sections Ten and Eleven of Title 18, U.S.C. (1946 Ed.). Section Ten, as originally enacted and as it was in force at that time, read as follows:

> "(a) It shall be unlawful for any person—
>
> "(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> "(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> "(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any gov-

ernment in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

Original Section Eleven read as follows:

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

In the light of this statute, the Supreme Court wrote the principles which defendants say the trial court here refused to follow in several essentials. First, it is contended that basic liberties guaranteed by the First Amendment and other constitutional provision were submerged by an expanding wave of restraint brought about by an improper application of the Smith Act. Second, they say the highest court required a finding of a clear and present danger from the conspiracy, and none was made at this trial. Third, defendants claim the approval of the Supreme Court of certain other striking phrases given currency in the trial of the Dennis case constituted positive fiat that these be used in all future cases.

First, the Supreme Court ruled definitely that constitutionally guaranteed rights, including freedom of speech, of publication and of assembly, were not violated by indictment and conviction under the Smith Act in the form above quoted. The courts were dealing there with substantive law as set out in that statute, which related to organization for the purpose of teaching and advocating overthrow. Section Eleven of the Act as it then read, by use of the words "to conspire to commit," denounced

as principals all who engaged in the attempt or in joint action to bring about the acts specified as criminal. Mere membership or officership in the Communist Party, insofar as that organization was shown by the evidence to teach the proscribed doctrine, might have been taken as proof against the individual defendant of joint action with others to bring about the end intended.

However, in the face of the challenge of the dissents there, the Supreme Court held the nature of the joint activities of those involved was such as to bring about a "clear and present danger" and that, collectively, the conspirators had "power to bring about the evil." The latter phrase apparently meant that the setting in which the defendants there acted was such as to allow the court to conclude that the teachings might have resulted in an attempt at overthrow. It is true that, in accomplishing the result, the courts treated the Smith Act as though the substantive crime of conspiracy were charged. Moreover, the appellate courts approved the importation into the statute of a specific intent and object which was not expressly authorized by the wording of the particular section and which was not incorporated in the formal charge. As we shall see hereafter, the current indictment gave scope for these judicial additions.

Specifically in the second place, it is said the trial judge here violated principles there enunciated by failing to find a "clear and present danger" to the government by whatever the proof showed was said and done by defendants. In the Dennis case, with a factual situation typical of the case at bar, the highest court approved a statement as a matter of law by the trial judge that

a clear and present danger there existed in virtue of acts and intent of the defendants in that group. If that were a true rule of law for the Dennis case, it is the rule of law here. For world conditions at the date of that trial had not changed for the better when trial in the instant case was had. It must be remembered that the eleven convicted defendants in that case were named in this indictment as co-conspirators although not made defendants. Much of the literature and writings introduced were identical, as was the general type of proof, although we attempt no comparison of the respective records. While an independent conspiracy was charged here, the design was as closely connected as to the previous combination as a spoke to the wheel.[3] There organization was charged nationally, and here there was special emphasis on organization in California. The essential pattern was similar. Since this may not be the exact point of the contention, the matter will be considered in other connections later.

Finally, the opinion of the Court of Appeals and a concurring opinion in the Supreme Court gave approval of instructions of the trial judge in Dennis requiring the jury to find "language of incitement" was used by the conspirators there. Another phrase given approval is that the doctrine of destruction had became a "rule of action." In conjunction with an indictment based upon such a statute proscribing organization for the purpose of teaching and advocating overthrow, but which required neither proof of overt acts nor a specifically planned objective, such precautionary instructions were well enough. But these expressions of the judges in instructions in

[3]See Kotteakos vs. United States, 328 U.S. 750.

connection with the original statute established no unalterable requirement that such phrases themselves be used *ipsissimis verbis* where the changes in the basic law and an entirely different indictment predicated upon the conspiracy statute have rendered admonitions to a jury in such language supererogatory. Such claims have been answered in the main opinion in Dennis:

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. * * * To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

Defendants themselves say that there were significant legal and factual differences between the situation in the Dennis case and the case at bar. We agree. The situation has been changed by farreaching legislation and rulings in further and complete protection of the rights of these defendants. As a result, there are vital distinctions between this case and those which have been previously ruled upon.

The question is whether the trial court here followed the applicable concepts of Dennis in a changed situation. The attacks upon the manner in which the case at bar was tried and the incidents are now for consideration.

The indictment[4] charged the defendants themselves and certain persons convicted in the Dennis case with conspiring (18 U.S.C.A. Section 371) to commit offenses against the United States prohibited by the Smith Act as amended, 54 Stat. 670 (1940); 18 U.S.C. (1946 Ed.) Section 10, (1948 Ed.) Section 2385,[5] "by (1) willfully and knowingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as

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[4]The comparison of the indictments in the Dennis case and the case at bar is graphically set out in United States vs. Schneiderman, 102 F. Supp., at pages 97-102.

[5]The Smith Act, in the form in which it appeared upon the books at the time of the trial here and at present, reads as follows:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction." 18 U.S.C.A. § 2385.

speedily as circumstances would permit and by (2) willfully and knowingly organizing and helping to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

The means were elaborated by charging, as a part of the conspiracy, the matters epitomized as follows: (2) "conspirators would become members, officers or functionaries in the Communist Party." "and in such capacities would assume leadership" "and responsibility for carrying out its policies and activities"; (3) would cause to be organized units of the party in New York and California and would recruit members; (4) would publicize and circulate publications advocating overthrow; (5) would write articles and directives for printing in publications of the Communist Party; (6) would conduct schools and classes in which recruits and members would be indoctrinated; (7) would agree upon and carry into effect plans for vital parts of the Communist Party to go underground and there continue the conspiracy; (8) would use false names and documents to conceal their identities and activities as members and functionaries, and (9) would conceal the existence and operations of the conspiracy.

A series of overt acts were alleged to have been done by one or more defendants "in furtherance of the objective of the consp acy."

The first of the differences between this and the Dennis case is that the present indictment charges the inception of this crime as a continuing conspiracy on June 28, 1940, and in full effect until the date of finding of the indictment, which was December 21, 1951. This, of course, constitutes no ground for objection to the indictment. The mere fact that the indictment for the coordinate activities in the Dennis case was less broad in scope is of no avail to defendants here. Certain phases of the claim of variance will be dealt with later.

Second, it is contended that a change was caused by legislation for the protection of defendants. A new Act provided that officership or membership in the Communist Party should not constitute "per se" a violation of that Act, requiring registration by such members, "or of any other criminal statute."[6] Likewise, it was provided therein that registration by a Communist member or officer under that Act should not be used as evidence against him in any criminal proceeding. Apparently, this made a change in the law previously, as teachers and club chairmen were held to be in the position of co-conspirators in the Dennis case. 183 F.2d 230, 231. At this point, concern is had only with the effect of the section just referred to upon the indictment. The divergence from the form of indictment used in the Dennis case required peculiar phrasing emphasizing the individual nature of the charge. The instrument here highlights the fact that, among the means agreed upon, the individual defendants were to obtain membership and offices and assume leadership in order

[6]September 23, 1950, ch. 1024, Title 1, Section 4, 64 Stat. 991, 50 U.S.C.A. Section 783(f).

to bring about the objective charged. The Communist Party of the United States was not indicted. No defendant was indicted for organizing the Communist Party of the United States. None was charged with guilt because of membership or holding office in that party. But each was fairly charged with joining in concert of action to organize a society "as the Communist Party" and to use leadership therein with the intent to accomplish overthrow.

The third change was farreaching. Since the Supreme Court had upheld a conviction for joint action under substantive provisions of the Smith Act as then written, it was a great protection that Congress, by the change in the wording of the law, left the way open to discard the vague "conspiracy" clause of the original statute, and to use instead the standardized body of law with which the profession was familiar by framing the indictment under the specific enactment proscribing conspiracy as a substantive offense.

This section, which was first placed upon the books in the year 1867, is now codified with some changes as 18 U.S.C.A. Section 371, which reads in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The literature of the law relating to the substantive crime of conspiracy is voluminous and covers every phrase of

indictment, trial and judgment.[7] The use of the statute in this case was of great advantage to defendants as well as the government, since the precedents made the issues crystal clear[8] and enabled the trial judge to rule with justice. Specifically, this charge of the substantive crime of conspiracy placed the government under heavy burden as to proof, which will be explained hereafter. In the Dennis case, the courts treated the original Smith Act quoted above as containing a charge of conspiracy and applied the law without any of the limitations set up by the precedents which have been developed under Section 371. It cannot therefore be charged by any except a lawyer impelled by zeal for a client that the instant case is one "where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." But the objection is, of course, urged here by lawyers for the defendants. The concurring opinion of Mr. Justice Jackson in the Dennis case, which treated the indictment there as if it contained a charge of conspiracy as a substantive crime, was, of course, unsound as related to that case. The doctrine was treated as applicable in that opinion although the limitations contained in the statute are not mentioned. Although it is clear that, in the opinion of the other justices, a true conspiracy charge was not involved, the convictions were upheld in the face of the exposition of the place in our political structure which is maintained by personalized individual freedom of speech, publication and assembly.

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[7]The notes of decisions under this statute cover over 315 pages of United States Code Annotated.

[8]Cf. Pinkerton vs. United States, 328 U.S. 640.

An indictment which, as the one at bar, charges an agreement by two or more persons willfully and knowingly to organize a group, society or assembly of persons and thereby develop and use an apparatus designed and dedicated to advocate and teach overthrow and destruction of the government by force and violence when each person entering the concert of action is charged with entertaining the specific objective and intent of causing such overthrow pleads a "standard" conspiracy.

Where an unlawful agreement is set up, even though the means intended to be used were entirely legal, if the ultimate objective be criminal, a conspiracy is alleged. Under this indictment, if it be assumed that advocacy and teaching are immunized by the constitutional guaranties, still, even though these means were lawful and protected, since the advocacy was intended to cause the destruction and overthrow of the government by force, a criminal conspiracy was defined.

An overwhelming advantage to each defendant by indictment under 18 U.S.C.A. Section 271, was the provision thereof which required an "overt act" to be proved as well as a "conspiracy" before conviction could be had under this phase of the Smith Act itself. This was a far-reaching change from the situation in the Dennis case for persons accused. By the statement of things actually done by a particular person or persons, the matter was not left to conjecture as to the nebulous design based upon utterances and publications alone, but specific occurrences were to be set up whereby the supposed conspirators in unlawful agreement effected a debouchment into the field of positive action. Defendants make an elaborate theoretical

argument that the "act of conspiring" or "compassing by bare words or saying" or "the imagination of the mind to do wrong" is not sufficient "without an overt act." However effective this thesis might have been in the Dennis case, it is frustrated and rendered nought by the form of the indictment. Congress had already answered the theoretical thesis by the amendment above noted, which emphasizes the deep gulf between the situation here and that in the Dennis case. But the pleader here included the overt acts charged as carrying out the "standard" conspiracy of Section 371. Twenty-one allegations of overt acts were made, which is sufficient. The suggestion that the acts alleged were in themselves innocuous is not valid. The law relating to this crime does not require more than the allegation contained in the indictment that these were done in pursuance of the unlawful agreement and to effect the purpose thereof.

The principles of freedom applied to speech, publication and assembly must be preserved. Under the instant indictment, there are implications which must be considered, but the impact is much less direct than in the Dennis case. As heretofore indicated, the charge here is of a substantive conspiracy to act with a definite objective where one overt act must be alleged. The teaching and advocacy of the duty and necessity of destruction of the government by force and violence, although criminal by substantive enactment, are here by the language of the charge made subservient to the alleged purpose and object of organizing to advocate and teach with intent to destroy and overthrow as speedily as circumstances permit. The indictment in the Dennis case was entirely different.

Finally, a vital metamorphosis was brought about by attacks of defendants themselves upon the two original indictments. The trial judge held that such indictments did not sufficiently state the ultimate object of the conspiracy and the individual intent of each conspirator to bring the postulated action to fruition. In redrafting, the pleader amalgamated the two indictments and added the words which had been approved by the Supreme Court as sufficient to set forth a criminal state of mind in Dennis. The defendants were advised beforehand that the government was to establish as a prerequisite of conviction that each one had as an object "the overthrow and destruction of the Government of the United States by force and violence as speedily as the circumstances would permit." As noted above, it is hornbook law that a conspiracy is an agreement by two or more persons to accomplish a lawful objective by unlawful means or, on the other hand, by lawful means an illegal objective.[9] By making this one of the essentials of proof beyond a reasonable doubt by the government as to each individual before he could be designated as a co-conspirator, by the process of stating in the indictment the objects of the alleged "standard" conspiracy, a chemical change was wrought therein.

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[9]The trial court consistently and definitely ruled throughout the trial and the instructions that this was a conspiracy to violate the Smith Act. Although purists might find a difference between conspiring to teach, advocate and organize with intent to bring about speedy overthrow and destruction by force and violence and conspiring "to overthrow, put down, or destroy by force the Government of the United States," proscribed by 18 U.S.C.A. § 2384, the latter statute which was mentioned in the Dennis case (pp. 581-2) might well be applicable to the indictment here. No problem arises in that connection since the trial court clung to the theory that the Smith Act alone was applicable.

Defendants made a motion to dismiss the present indictment. It is implicit in the contention thereon that they assert the phrases heretofore referred to must have been included and that it must be charged formally that the activities of defendants created a "clear and present danger," that each defendant had "power to bring about the evil," that defendants conspired and agreed to use the "language of incitement" in teaching and advocacy, and that defendants conspired and agreed to make the duty and necessity of overthrow a "rule of action." Defendants were hampered in making such arguments explicit because neither the indictment in the Dennis case nor that in the Flynn contained any such allegations.

The trial court correctly held that the indictment charging a standard conspiracy to commit offenses against the United States in violation of the amended Smith Act, by teaching, advocating and organizing, alleging specific overt acts and defining precisely a proscribed intent, was sufficient.

Finally, in its present form, the indictment by its inherent terms charged not only that the language of incitement was used, but it was used in order that the proscribed doctrine should become a rule of action. It is the very gist and gravamen of the present charge that action was agreed upon in organizing local groups and societies in California and in infiltrating labor unions and other organizations. It was alleged that overt acts were committed. In ordinary crimes, this is sufficient. If conspirators to commit a crime of violence are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained.

This leads to another contention of defendants, which is laid at rest by the language of the charging instrument. It is contended that the trial court incorrectly defined the word "organize" used therein. But the indictment itself charges that the conspiracy was to organize a society, group and assembly of persons who advocate and teach the duty and necessity of overthrow "as the Communist Party." It is alleged that the conspiracy continued until the date of the finding of the indictment. But the basic charge was expanded by the specific clause. "Organize" is defined by exact phraseology in Section (3) of the indictment as follows:

> "It was further part of said conspiracy that said defendants and co-conspirators would cause to be organized Groups, Clubs, Sections, District and State Units of said Party in the State of California and elsewhere and would recruit and encourage recruitment of members of said Party concentrating on recruiting persons employed in key bases, industries and plants."

Even if the Communist Party of the United States were given a constitution and by-laws in 1945, as defendants contend, by the help of the co-conspirators and had certain officers, this does not mark the date when this combination completed organization of a group, society or assembly of people who advocate and teach destruction "*as the Communist Party of the United States.*"

The dictionary definition of organization indicates that "to organize an army" is a phrase which clarifies the meaning of the verb. If one started out to organize the 25th Army with nothing more than the order creating the

entity, organization would not be complete simply because the headquarters had been put together and the general officers and staff officers selected. The bare cadres of the regiment would not be sufficient. Recruitment, formation of units, completing officer personnel, regrouping of personnel in different units and expansion of various units to the prescribed or desired strength would be necessary. We may well agree that, once the 25th Army has been completely created to authorized strength and officered, thereafter recruiting for replacement or change of one regiment for another would not fall within the designation. The charge that there was a conspiracy to organize the 25th Revolutionary Army, there being no such organization at the time, might, of course, show that the concert of action for that purpose lasted for years.

This consideration brings up logically the next contention of the defendants that the Statute of Limitations barred prosecution in this case. The indictment itself destroys this argument. As noted before, it charges a continuing conspiracy from June 28, 1940, to the date of finding the indictment. The contention is that the Communist Party of the United States was completely organized in 1945 and that therefore the statute ran against this portion of the charge. It has already been noted there is no charge of conspiracy to organize the Communist Party of the United States as such. The activities of organization are particularly defined in the indictment. There is no doubt that certain of these activities occurred within three years of the filing of the formal charge.

The accusation is of a continuing conspiracy. Even if the above considerations were unsound, still the indict-

ment would be valid and timely because it is alleged that the conspiracy continued until the date of the finding in the indictment. If, in a conspiracy of a nonpolitical nature, it were alleged that the defendant combined and agreed to commit two offenses or crimes with the design to bring about an ultimate objective as soon as circumstances would permit and committed overt acts pursuant to the conspiracy within the three year period, the indictment would be sufficient. Even if it were established by judicial knowledge or otherwise that one of the substantive crimes charged as the objective of the continuing conspiracy had been fully consummate and complete, so that the statute of limitations had run against prosecution of the substantive offense, still an indictment would lie for a conspiracy, the grand objective of which had not yet been attained. Here, where the charge is that each defendant acted with intent to bring about the overthrow and destruction of the Government of the United States, it cannot be assumed from reading the indictment that the defendants abandoned the conspiracy until the event which they intended had been consummated. Only one conspiracy is charged, to commit several offenses against the United States. Therefore, the mere fact, assuming it to have been proved, that the crime of organizing had been complete, the conspiracy would still have continued in order to teach and to advocate destruction.

In this place, because it is a logical development, the question of the scope of the conspiracy in time and the supposed variance will be considered, although phases of proof and instructions enter therein. One of the most distorted concepts of the defendants is that, if an agent

or attorney employed by the United States has taken a position in some criminal prosecution that the Communist Party was completely organized in 1945 or that a court has accepted such a position for the purposes of the case before them, the United States is thereby estopped in this case from taking any contrary position. This concept is not founded upon any familiar doctrine of double jeopardy, res adjudicata or estoppel by judgment. Defendants make the claim for all parties and each defendant, whether or not he may have had connection with the previous litigation.

These contentions will be squarely met. None of these claims is valid. These defendants, who were not parties to the Dennis case or the Flynn case[10] can hardly have been prejudiced if the United States Attorney in Los Angeles charged a conspiracy separate from the ones in those case, as initiated in 1940 and continuing until 1950. The principles laid down by the Supreme Court in the Dennis case are applicable, but no one has contended that the facts of the two cases were exactly the same. The mere fact that there was a connection between the defendants and the parties charged in the Dennis case and that the over-all criminal design was the same is of no

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[10]In United States vs. Flynn (S.D.N.Y., unreported), the instruction was that the statute of limitations had run against the conspiracy so far as organizing was concerned. This may have been well enough as a precaution. Actually, it was prejudicial to defendants since the government was thereby relieved of the necessity of proving that the defendants combined to organize. The instruction on this feature was: "To find a defendant guilty, therefore, you must find that he conspired to teach, but it is not necessary that you find as well that he conspired to organize the Communist Party."

relevance. The government was not estopped from alleging and proving that these defendants conspired to help organize a society, group or assembly "as" a part of the Communist Party in the State of California.

The fact that another contention was made in another record or was stated by some court in dealing with other contentions is not binding here. The fact, if it be a fact, that there were constitution and by-laws adopted in 1945 would not mean that the party was organized except in the loose sense. But the organization of a group, society and assembly would not be completed by that formal constitution. There would still have to be members, and it was specifically charged that, to complete the membership in California, it was the design to add new groups and recruit new members. Of this defendants were on notice. They could not be heard to complain that in some other case the agents of the government proved something different. The defense offered no proof of a contrary state of facts than that shown here. Furthermore, there was not introduced in evidence any record in which the facts here claimed to have been adjudicated were established.

By the same process, the remainder of the defendants attempt to take advantage of the favorable opinion of the Supreme Court of the United States in the case entitled William Schneiderman vs. United States, 320 U.S. 118. Here again, no record was proven. The defendants here were not parties to the prior civil case. They could take no advantage of it, whatever the holding.

Furthermore, even as to Schneiderman himself, the denaturalization case was not res adjudicata. The record

was not introduced[11] as to him either. The true state of the matter was that the trial court there made findings of fact that Schneiderman was not attached to the principles of the Constitution of the United States because he was an officer in the Communist Party at the date of his admission, and cancelled his citizenship. The Supreme Court of the United States had no power to make findings on appeal, but dismissed the case, apparently on the ground that Schneiderman was not shown personally to have interpreted the Communist literature as advocating overthrow and that therefore the findings were clearly erroneous. Other opinions there seemed to go on the ground that, at the naturalization hearing, the court had found that Schneiderman was attached to the principles of the Constitution. In any event, whatever the holding it can do Schneiderman no good here. No precedent has been cited nor are there any which establish the doctrine that a prior judgment in a cancellation of citizenship case estops the government or that the findings therein are res adjudicata against the government in a subsequent criminal case. The analogies are all to the contrary. It is a bright idea, but no one seems to have thought of it before.

Attention is now directed to the claimed error in the admission of specific evidence. Apparently there is urged that no proof was admissible as to any overt act, because it is said none of those alleged could have been such as "clearly and unequivocally to effect the specific object of the conspiracy." The specific object, according to the in-

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[11]The majority opinion of the Supreme Court without the dissent was introduced, which was highly favorable, but this did not supply the essential foundation required to establish such an affirmative defense.

dictment was the teaching and the advocacy and organization for destruction and overthrow. Even belief may be removed from the circle of immunization, although this cannot be done "in the absence of over act indicating such was his interpretation."

To take one example, the indictment charged, as mentioned above, one such act in the following language

> "On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting."

The proof showed that the meeting was called for several purposes, as outlined below. Steinberg made a number of speeches there, and stated that "this was a Lenin Memorial meeting," at which he presided. An announcement of the meeting in the People's World asked persons to attend and "demonstrate for the Bill of Rights" as it would "serve primarily as a protest against the current trial in New York of twelve national leaders of the party." There was no question about the facts, which were uncontroverted, if the jury believed the testimony.

In the face of the objections that this was the act of a member and officer of the Communist Party and that it had no reasonable tendency to effect the proscribed objective, the evidence was clearly admissible to show the acts and intent of Steinberg personally or his participation. Without doubt, aside from this, the evidence was admissible on the allegation of the overt act. It was for the jury to determine, under proper instruction, whether the act was done with the intent and whether it tended to effect the object. Other allegations of overt acts made admissible proof thereof. No detailed discussion will be

accorded them therefore. In each instance, the evidence admitted could have been justified upon the ground that it was in any event relevant as to the intent or participation of a particular defendant.

The defendants object strenuously to the receiving in evidence of various classes of reported words of the defendants and other persons. This question has been raised in each of the cases which have arisen under the terms of this Act, and it has been uniformly held that the usual rules of the criminal law in relation to conspiracy prevail. The chief complaint as to the utterances of the defendants themselves is that they are not sufficient to establish conspiracy or intent. But the expressions of a defendant in a criminal case are admissible against him either as admissions against interest or as voluntary acts which it is testified he has done. These utterances of a particular defendant were not protected from admission into evidence by the guaranties of freedom of speech. They could be related to a jury for the purpose of allowing the jury to determine whether the party were acting with an innocent or guilty intent as required. In criminal cases, the utterances of a defendant reported in court by other witnesses have always been received to determine intent. The declarations and acts of each defendant on his own account are particularly important since his individual participation and intent must be shown independently of and without relation to declarations or acts of others.

Before the acts and declarations of third persons become binding upon an individual under the law of conspiracy, there must be shown to be (1) an illegal agreement to commit crime by two or more persons, (2) that the particular defendant was a knowing and willful par-

ticipant, and (3) that the act or declaration by third party conspirator was in pursuance to and in order to bring about the criminal objective. Proof of close association and concert of action over a period of years among those charged as co-conspirators might have established prima facie the unlawful agreement. If the other conditions were met, declarations and acts of third parties would be admissible against a particular defendant. In this connection, the proof of the association was not inadmissible by the particular defendant's membership or holding office in the Communist Party, for the indictment charges that the organization of a society or group was one of the objects, and even defendants do not claim organization of the party until 1945. But it is claimed that the third party declarant cannot be shown to be a co-conspirator by his own admission of membership in the party. This is correct. But proof of association in the activities, coupled with such a declaration might be sufficient. No instance was pointed out where such connection was not shown.

A great deal of evidence to prove "the nature and character and aims and objectives of the Communist Party" were objected to, and admission is assigned as error. It is, of course, agreed that the party was not indicted. But defendants were charged with conspiracy to organize a society or group to advocate and teach. Everything which was advocated and taught at meetings of the group or society would be relevant to determine what the purpose of the organization was. If it was found that the society or group was in the process of organization as the Communist Party, the teaching and advocacy under its auspices would be pertinent, whether

or not defendants were present. It is true, an expression or utterance at such meeting would not be binding upon the Communist Party and, unless made by a co-conspirator, would not be binding upon a particular defendant, but it would be admissible. However, what was taught and advocated at schools and meetings of the Communist Party after the date of the formation of the conspiracy would be admissible in order to prove how much, if any, success the conspirators had in carrying out their illegal plan to organize groups, societies or assemblies and obtain recruits and to teach and advocate destruction. This became particularly pertinent in determining whether the conspiracy was still continuing during the three-year period prior to indictment and in determining with what intent any defendant did one of the alleged overt acts within that period.

There was no statute such as the Smith Act before the passage of that enactment in its original form on June 28, 1940. It is contended that no evidence of the aims and objectives of the Communist Party then in existence (and which defendants claimed was later dissolved) by expressions at its meetings or the teaching in its schools was entitled to admission. But it must be remeinbered that some defendants were shown to have been closely associated with that organization and with each other, and they claim that its teachings were innocuous. The government was not selective, but introduced the literature and the expressions. These were pertinent if only to show there were other possible interpretations of the doctrine besides the version to which defendant Yates testified. Defendants had full opportuntiy to rebut these

interpretations. It cannot be said these were inadmissible. The trial court might possibly have excluded such testimony on the ground of considerations of remoteness or administrative convenience. It was unquestionably relevant and therefore it was not error or abuse of discretion to admit the evidence.

After the introduction of the evidence by the government, which ran over nine thousand pages besides the voluminous exhibits, all defendants rested except Schneiderman, Yates, Stack and Carlson. The evidence of the defense consisted of two witnesses who testified shortly, the reading of a deposition and the testimony of defendant Yates. The latter consisted almost exclusively in an exposition of her "understanding" of the Communist Party teaching and advocacy on achieving the socialist revolution. Although the evidence intrinsically must be sufficient to conviet beyond a reasonable doubt as to each defendant, it must be borne in mind that the jury weighed evidence which was in essentials uncontradicted.

Many of the arguments and indeed most of them, are reiterated in relation to the instructions given and refused. The trial court gave instructions on the subject of conspiracy to commit offenses against the United States, which are couched in precise and accurate language and which correctly reflect concepts approved by the Supreme Court and other federal courts over the period of approximately eighty years during which this law has been upon the statute books. Appropriate cautions were given to protect fully the rights of defendants.

It was said that the conspiracy must be found to have existed as charged before the allegations of overt acts

could be considered. The defendants contend that the overt acts charged in the indictment consisted of the exercise of either freedom of utterance, freedom of publication, or the free use of the right peaceably to assemble, and that therefore such acts, having been immunized by the Constitution, could not be used as indicia of crime. But it is well settled in ordinary conspiracy cases that the overt act proven need not have inherent criminal attributes or connotations, if it carries the illegal design into the field of action. For, if criminal purposes can be shielded from prosecution by the use of speech, there will be no more convictions of those clever enough to use this medium.

It is true such an act in itself could be innocent. In order to consummate the conspiracy, as the court said, "It must, however, be an act which follows and tends to accomplish the plan or agreement, and must be knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment."

The trial court carefully limited the effect of testimony as to membership and officership in the Communist Party. Cautions against use of "similarity of conduct" or "association" or discussion of common "aims and interests" as absolute tests were given. The court instructed:

> "It has been said that 'a conspiracy is a partnership in criminal purposes'. The gist of the offense is a combination or agreement to violate the law,"

and that, if all elements of conspiracy were established,

> "then the success or failure of the conspiracy to accomplish the common purpose or design is immaterial."

The requested instructions of the defendants, which the court refused, constitute a series of strange and distorted propositions as to the law of conspiracy. Defendants contend that it was error to refuse a requested instruction that "the burden of proof cannot be met by showing that a particular interpretation of Marxist-Leninist theory is the most correct or the most probable interpretation with an inference therefrom that the Communist Party accept such interpretation" embodies all these errors. The conspirators were not indicted for teaching Marxist-Leninist philosophy or that of Stalin or Malenkov, but for conspiracy sparked by an intent to destroy.

The indictment did not charge that this literature on its face bore a sinister meaning, nor even that the individual defendants gave it a sinister meaning. Interpretations of the teachings of the Communist Party have no relevance because that entity was not on trial, nor were the doctrines which may have been taught or advocated by it. Defendants individually must have been found to have had the intent of immediate destruction. Each must have been found to have become a member of a combination so to teach and advocate and to organize persons who so teach and advocate with this object in view. Thus the interpretation of the literature, the written objectives and the constitution of the Communist Party of the United States, and the writings and speeches of the members and officials were irrelevant except as these tended to prove or disprove the individual guilt of the particular defendant of the crime charged in the indictment. Some instructions requested would give complete immuniza-

tion to any speech, no matter if specifically uttered with the intent charged in this indictment. Any such formalistic test as this would, of course, give free rein to any subversive group because all they would have to do is to assemble to speak and to print words and distribute them. If then there could be argued that the meaning might be innocent on its face, the jury could not convict, according to appellants, even if it were one of the methods used to bring a conspiracy into the field of action.

Defendants apparently now contend the trial court should have told the jury that he found as a matter of law that the facts proved indicated "a clear and present danger." At least, they give lip-service to that contention. In our opinion, such an instruction could be justified only as a comment on the evidence. The instructions of the trial court clearly show that, if the jury convicted under the rules of law there laid down, they would have necessarily found a clear and present danger existed. If the trial judge had offered to instruct the jury as a matter of law on this subject, it seems that an exception[12] might have been taken on the ground of over-emphasis. The state of the evidence might justify it as it did in the Dennis case. Defendants can not rely upon the failure to make the comment by the trial court (a) because the exercise, whether justified or not, would be highly unfavorable to them, (b) because no litigant is entitled to a comment of fact by the judge, and (c) because the

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[12]As the record shows, objection was made to Government's proposed instruction No. 23, which embodied a charge like that given in Dennis (R. 12346-7).

normal place for the trial judge to rule upon the question of law as to sufficiency of the evidence, including presence of clear and present danger would be upon a motion for acquittal.

Closely connected with this is the objection that the District Court made no ruling upon the power of each of the defendants "to bring about the evil." But the Supreme Court did not require any such proof as to each defendant in the Dennis case. It is obvious enough that, if it had, there could have been no conviction. To require the court to instruct that the co-conspirators as a whole or that each defendant had the power to bring about the destruction of the government would be fantastic. If true, the revolution would have been consummated before trial. To require such a finding by a jury would be to ask them to take counsel of fear. In reliance upon the national aims and aspirations and the just consent of the governed, there are no such fears. On the other hand, if the trial court had thought these actions and utterances were merely vaporings of ineffective folk, upon motions for acquittal, a verdict of acquittal could have been directed.

Again, defendants make a point about the "language of incitement." They said the co-conspirators must have agreed not only to teach and advocate the violent overthrow as a duty and necessity with intent to bring it about as speedily as circumstances would permit, but that the trial judge must have told the jury that, if it were found that they had agreed not to use the language of incitement in teaching and advocacy thereof, no crime would have been committed.

The gist of the substantive crime of conspiracy is that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute. The use of such phrases in instructions might have been well enough where a violation of the Smith Act alone was charged in its original form. It would be folly to command imperatively that these specific phrases be each used in instructions after a trial on an indictment such as the present one.

In ruling upon the motions for acquittal, the trial court[18] decided as a matter of law that there was sufficient evidence to prove guilt of each defendant. In this ruling the trial court placed itself firmly as to each defendant upon the indictment which charged a conspiracy. The Supreme Court, in its main opinion in the Dennis case, said, "The formation by petitioners of such a highly organized conspiracy • • • subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions • • • convince us that their convictions were justified." There was sufficient evidence to show that

[18]The attitude of the trial judge to the questions argued here, and many others, is set out in a series of opinions: United States vs. Schneiderman, 102 F. Supp. 87 (dismissing the two original indictments); 104 F.Supp. 405 (in camera inspection of documents); 106 F.Supp. 737 (disclosure of notes of witness); 106 F.Supp. 892 (striking of evidence); 106 F.Supp. 906 (motions for judgment of acquittal, new trial and arrest of judgment); 106 F.Supp. 927-941 (instructions to the jury).

such a conspiracy existed, particularized as to the California area, and that it was implemented by continuous organization and use of groups and societies for teaching and advocating with the proscribed intent, the determination of the trial court must be upheld. The arguments urging upon us that the trial court held that "advocacy plus intent" was sufficient to found a conviction has no basis. The trial judge did not rule that clear and present danger could be found to exist simply upon the basis of the possession of the proscribed intent. The trial judge "equated" "incitement" neither with "clear and present danger" nor "incitement" with the intent to bring about speedy overthrow. On the other hand, by applying the specific law of conspiracy, we are not convinced that the trial court found governmental powers by implication to be without inherent limits or exploited this law to engulf all powers which might possibly be exercised by an absolute sovereignty in the face of express prohibition. Indeed, the arguments presented by defendants and amicus curiae are paradoxical. Some of these declare with great insistence that there should not be one law for trial of Communists and another law for trial of persons charged with crime generally: a doctrine which requires no exposition in this Court. It is with utter inconsistency that they urge measures fantastic and bizarre which have never been applied in ordinary criminal cases. The most striking incongruities are found in these presentations. No further notice in detail will be taken thereof, but a short review of some of the matters considered by the trial court will prove the soundness of his rulings with regard to the evidence.

The most significant questions which are present in this record are those which relate to sufficiency of the evidence. The review by the Supreme Court of the Dennis case did not explicitly relate to the sufficiency of the evidence there. But the opinion of the Court of Appeals leaves no doubt that there was a sufficiency of evidence in that case. There is no attempt here to compare the content of the record in this case with that in the Dennis case or the Flynn case or any other case prosecuted under this statue.

There are only two questions in this regard for this Court. First, whether on each specific point essential for conviction there is sufficient evidence so that it can be said a jury could find the issue was established beyond a reasonable doubt and to a moral certainty. The jury, by the verdict, have already expressed their satisfaction with the proof. Second, whether, on the record as a whole, it affirmatively appears that the trial was fair and impartial and the verict can be sustained.

Many of defendants sought and obtained office as "organizers" in the party. The jury might well have inferred from this participation a carrying into the field of action a phase of an illegal agreement to organize a group, society or assembly and thereby to furnish the society with organs and to arrange and constitute into interdependent parts the Communist Party in California and to furnish recruits therefor. It must always be remembered that the jury were regularly instructed that membership or holding office in the party are not denounced as such. But this would not prevent them from concluding that acceptance of an office designated as

"organizer" with duties to assist in organization, evinced a participation in the unlawful agreement and, together with other circumstances as to a particular defendant, might prove it beyond a reasonable doubt.

The association of most of defendants among themselves and with other co-conspirators and with other persons whose advocacy of destruction is known was clearly proved. Their acts and conduct in close control of schools and classes where party members and putative recruits were taught the tenets of violent overthrow were clearly established. Indoctrination in techniques of action to induce revolution and of assaults upon citadels of bourgeois power was furthered and encouraged by these instruments. As to many of them, an individual finding that he was a well-trained professional revolutionist might well have been made. The concert of action of all could have been found by a jury beyond a reasonable doubt. The proscribed intent could also have been found as to any defendant. The jury were entitled to infer from the associations and the activities of the individual defendants participation in the unlawful agreement charged in violation of the specific statute. As to each defendant,[14] the jury might well have found a sufficiency of evidence of association and concerted action to convince them of guilt to a moral certainty by evidence

[14]Each of the separate defendants has filed a brief contending the evidence was insufficient to sustain a conviction as to him. These have been carefully considered in a review of the record. The evidence was sufficient to submit to the jury as to each. Certainly, therefore, as to each the evidence was sufficient to sustain a verdict of guilty. It is unnecessary to set out tabulations of the facts here.

which was inconsistent with every other reasonable hypothesis.

Therefore, it is the function of this Court to review the evidence in this case to determine whether the rulings of the trial court on the motions for directed verdict were correct.

We hold there was evidence from which the jury might have concluded beyond a reasonable doubt:

(a) That two or more persons named as conspirators, after June 28, 1940, had entered into a combination and conspiracy as charged in the indictment;

(b) That each defendant herein, knowing of the unlawful design, became a party thereto and entered into the combination and acted in concert with the others charged as conspirators;

(c) That after the formation of this conspiracy at least one overt act charged in the indictment to effect the object of the conspiracy and in furtherance of the objects thereof was performed by a defendant within three years prior to the filing of the indictment;

(d) That each defendant, in joining this concert of action and in any act done in furtherance thereof, had the specific intent to overthrow and destroy the government of the United States by force and violence as speedily as circumstances would permit.

Technically then, we find the trial impeccable from the standpoint of fairness and from the standpoint of adherence to principles theretofore laid down. It remains to consider some extraneous incidents. Appellants moved to postpone the trial because of the publication of a serialized article in a local paper with the usual lurid

announcements that revelations would be made as to "how the Communists intend to overthrow the U.S. Government and when" with a great deal more of similar import. The fact that the writer had been a witness in the trial of the New York defendants named here as co-conspirators was dwelt upon. The series opened January 20 and ended February 7, 1952. The trial opened and the jury was drawn on February 1. The defendants had opportunity for examination of members of the jury as to prejudice, bias and formation and expression of opinion. This is sufficient safeguard. No trial could ever be held during time of war, such as this was, if public discussion of vital national issues was the basis for postponement. The defendants had ample protection against an inclusion of a juror affected by such a newspaper discussion by the voir dire and the use of peremptory challenge. If the trial could have been postponed for sixty days for that reason, the defendants could never have been tried until Communism would have become a dead issue, no longer the subject of newspaper discussion. There was here no abuse of discretion.

There was a motion for mistrial based upon the affidavit of one of defendants, in which the following facts were set up: on June 25, 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, at the request of Senator McCarran, Chairman of the Senate Internal Security Subcommittee, forwarded to the latter a monograph prepared by this organization. This document dealt with the advocacy of the Communist Party of violent overthrow of the government, and contained considerable documentation from the so-called Marxist-Leninist clas-

sics. The monograph was released to the press in Washington by Senator McCarran on July 29, 1952. That day and thereafter, just as counsel for the defense had completed his first argument, the release commenced to receive widespread coverage in Los Angeles by all leading newspapers, radio and television, and through such media excerpts from the monograph were broadcast to the public. When the matter was called to the attention of the trial court by motion for mistrial, various suggestions were made as to how the matter might be handled to discover whether the jurors had disobeyed the continuous instructions of the court to confine their attention to the evidence. The defendants were clearly fencing. The trial court decided to trust the jury. This reliance upon members of that body to act as judges is in accordance with our finest traditions.

The trial court said: "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial." Unquestionably, the matter was of immense public interest and was within the public domain. The media of publication had a right to publish. It has been pointed out that the government of a republic cannot operate without the pitiless light of publicity. Great service is performed daily by exposure of matters which, if suppressed, would operate to destroy our security. When the country was at war, as it was on July 1, 1952, publicity was especially necessary over matters of national concern in moral and ideological defense of current aims. Still, it should never be forgotten that if there is failure to accord to defendants a fair and impartial trial in a criminal case, the

foundations are weakened. The powers of the trial court are conferred upon it for that express purpose. The media of publicity have an even greater responsibility than the courts to see that there is a fair trial of politically unpopular defendants. Somehow, there is a current belief that publicity is uncontrolled and that the courts are powerless to protect those charged with crime.

Ever since this Court has had this matter, there have been positive directions through publicity as to how it should be decided. But judges are products of a hardy climate. We do not palliate the offense, however. Such expressions do positive harm. It tends to make the public believe the courts accept such directions if the prophecy happens to be correct. It is much more true when a verdict of guilty is brought in after a great fanfare of publicity. With the trial court, we believe, to say the least, the incidents were extremely regrettable in the public interest.

However, a jury which had heard the evidence contained in this record over a period of six months, who deliberated for six days after the arguments, who had heard constantly reiterated warning not to read anything, not to listen to the radio and not to discuss anything which related to the case, probably tried to carry out their instructions and decide the case on the evidence. The trial judge believed this jury could be trusted. We do not think, simply because they arrived at a verdict of guilty, that his judgment was unsound.

Besides, there is a striking anomaly in the position of defendants. They claim the right to teach, advocate and assemble in the cause of sedition without interference so

long as they take no action. They claim the right to advocate the duty and necessity of the overthrow so long as they do so sotto voce. They claim the right to hold publicity meetings in honor of the political saint of a sinister foreign power and demand the acquittal of their fellow conspirators then on trial. Yet they protest the right of a United States senator to give out a release on a subject vital to the security of this country in time of war. Apparently the Bill of Rights is double-edged.

Even if the jurors or some of them heard or read some part of this public discussion—a fact not proved—this Court is of opinion the verdict was founded on the evidence. The trial court properly refused to invade the secrecy of the petit jury room in order to discover material to cavil at the determination.

In conclusion, in the Dennis case the court was dealing with the substantive crime denounced by the single statute.

> "The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of Sections 2(a) (1) and 2(a) (3) of the Smith Act, involved in the conspiracy charge."

This statute has now been amended and the present indictment is much broader and bottomed essentially on a different enactment. There, in construing the specific act, the main opinion suggests:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to

the particular situation, to ascertain if the Constitution prohibits the conviction."

While the Supreme Court professedly did not review the evidence of the trial, there is indication that, if it had not been deemed sufficient, the conviction of the co-conspirators would have been set aside. The main opinion states:

"'Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute."

It may be that prospects of larger policy or changes in the look of international affairs should be viewed to fix the acts proven here in perspective. But, as we understand it, as a lower federal court that is not our function. At the time this case was tried, there was a background of war. The law which was passed in 1940 was passed to meet emergencies created by war although not especially to meet the threat involved in this case. That enactment has been denounced as the first peacetime sedition law since 1798, although anyone who believes the country was not at war in 1940 does not squarely face the facts of life.[15] If the founders were advised that

[15]See opinion of December 23, 1940, Stone vs. Christenson, 36 F.Supp. 739: "The petition of Stone rings changes upon 'peace-

statute was necessary to meet the threat of the excesses of the French Jacobins then tending toward world-wide imperialism with a fatalistic zeal and a crusading flair and therefore compatible with the new Constitution, the Act of 1940 was probably advisedly deemed necessary by the Congress to provide for the national defense and protect the national ideals and aspirations.

On the other hand, the future of this country is embedded in the fundamental guaranties. The right to speak freely, even though tremendous majorities disagree, is fundamental. The power to assemble peaceably to present grievances is a foundation of liberty. The right to publish expressions and give them distribution despite official disapproval must be retained. The jury found defendants guilty beyond a reasonable doubt of conspiracy to commit offenses against the United States of America "with the intent of causing the aforesaid overthrow and destruction of the government by force and violence as speedily as circumstances would permit." The actions, teaching, publication and freedom of assembly allowed without implication of criminality seem sufficiently to have vindicated the fundamental guaranties. The trial court elaborated upon the rights of defendants as follows:

> "Under our system of law, guilt of crime is a personal and individual matter. You may not convict any defendant merely by reason of the fact that you may find him or her to have been an officer or member of the Communist Party of the United States, no matter what you may find were the principles and

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time' conscription. * * * but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, a failure to register manpower of the country would be a failure to provide for 'the common defense'."

doctrines advocated and taught by that party during the period covered by the indictment. * * * The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy. * * * Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants. * * * The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence. * * * The government referred to is the present Government of the United States, which does afford to the people democratic means for bringing about such changes as they desire; not some hypothetical future government which affords no such means. * * * The defendants, in common with all other persons living under our Constitution, have a general right protected by the First Amendment to hold, express, teach and advocate opinions, even though their opinions are rejected by the overwhelming majority of the American people; and have the further right to organize or combine peaceably with other persons for the purpose of spreading and promoting their opinions more effectively. * * * Whether

you agree with these opinions or whether they seem to you reasonable, unreasonable, absurd, distasteful or hateful has no bearing whatever on the right of other persons to maintain them and to seek to persuade others of their validity. * * * No inference that any of the defendants knowingly and wilfully conspired as charged in the indictment, or intended to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from the advocacy or teaching of socialism or other economic or political or social doctrines, by reason of any unpopularity of such doctrines or by reason of any opinion you may hold with respect to whether such doctrines, or the opinions or beliefs of any of the defendants, are unreasonable, distasteful, absurd or hateful. * * * The defendants, in common with other persons living under our Constitution, have the right protected by the First Amendment to criticize our system of Government and the Government itself, even though the speaking or writing of such criticism may undermine confidence in the Government or cause or increase discontent. They have the right also to criticize the foreign policy of the United States and the role being played by this country in international affairs; and to praise the foreign policy of other governments and the role being played by those governments in international affairs. * * * The right of the defendants to enjoy such freedom of expression is unaffected by whether or not the opinions spoken or published may seem to you to be crudely intemperate, or to contain falsehoods, or to be designed to embarrass the Government. No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of

the United States by force and violence, or of intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from such expressions alone. * * * Therefore, activities such as membership or officership in the Communist Party, or organization of units of the Communist Party, or recruitment of members, or the circulation of books, articles, magazines and newspapers, or the writing of articles and directives, or the conducting of schools and classes, or going 'underground,' or the use of fictitious names, are not to be considered unless you are satisfied beyond a reasonable doubt from all the evidence in the case that any such activities of the defendants or any of them, as you may find, were carried on as means or methods in furtherance of an object or purpose of the conspiracy alleged in the indictment. * * * No statement or writing of any kind purporting to declare the principles or theories of the Communist Party, or on any other topic, may be imputed to the Communist Party merely because made by some member, leader or officer of the party, or a teacher of a party school or class, in the course of party activities. * * * The defendants are not being tried to determine what kind of people they are, or what sort of things they would be likely to do if allowed to remain at liberty. Rather it is your duty to determine whether the evidence establishes beyond a reasonable doubt that they did do in the past the things charged in the indictment. * * * As previously stated, the intent required to convict a defendant is not merely the intentional conspiracy to teach and advocate the necessity and duty of overthrowing and destroying the Government of the United States by force and violence. It must also appear beyond a

reasonable doubt from the evidence in the case that such defendant had the further specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

Defendants were convicted of something very different from the use of speech, assembly or publication.

AFFIRMED.

(Endorsed:) Opinion. Filed Mar. 17, 1955.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,480

JUDGMENT

Appeals from the United States District Court for the Southern District of California, Central Division.

These causes came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and were duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED:) Judgment.

Filed and entered: March 17, 1955,

PAUL P. O'BRIEN, Clerk.

Appendix B

OPINIONS OF THE DISTRICT COURT.

U. S. v. Schneiderman, et al.

U. S. v. Spector, et al.

Numbers 21883 and 21940. Filed December 11, 1951, cited as 102 Fed. Supp. 87.

MATHES, District Judge.

It is charged in the indictment in each of these cases that the defendants conspired to commit offenses against the United States. 18 U.S.C. § 371. The offenses which the defendants stand accused of conspiring to commit are violations of the Smith Act. 54 Stat. 670 (1940); 18 U.S.C. (1946 ed.) § 10; 18 U.S.C. (1948 ed.) § 2385.

The material portions of the specific charges as laid in the indictments are in these words: "From and on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of California, and elsewhere, * * * the defendants herein, unlawfully, wilfully, and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act * * * by so conspiring (1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing the Government

of the United States by force and violence, and (2) unlawfully, wilfully, and knowingly to organize and help organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act * * *."

It is further charged in the indictments that, *inter alia:* "It was * * * a part of said conspiracy that said defendants and co-conspirators would write and cause to be written articles and directives in publications of the Communist Party of the United States of America including, but not limited to, 'Political Affairs,' 'Daily People's World,' 'Daily Worker,' and 'The Worker,' teaching and advocating the necessity of overthrowing and destroying the Government of the United States by force and violence;

"It was further a part of said conspiracy that said defendants and co-conspirators would conduct and cause to be conducted schools and classes * * * in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances permit * * *."

It is further charged that: "In pursuance of said conspiracy and to effect the objects thereof, the defendants and co-conspirators did commit, among others, * * * [fifteen overt acts] * * *."

The defendants have presented a joint motion to dismiss the two indictments upon several grounds, only

one of which requires discussion here. That ground is: "The indictments do not state facts sufficient to constitute offenses against the United States."

As a corollary to the ground just stated, the defendants argue that: "The indictments • • • by reason of their failure to set forth all necessary elements of the crime they purport to charge, deprive these defendants of their right, in a criminal prosecution, to be informed of the nature and cause of the accusation, in violation of the Sixth Amendment."

The defendants at bar stand accused of what appears to be in substance the same conspiracy of which Dennis and others were convicted in the Southern District of New York. See Dennis v. United States, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; id. 2 Cir., 1950, 183 F.2d 201; id. sub nom., United States v. Foster, D.C., S.D.N.Y. 1949, 9 F.R.D. 367, 374-375. Indeed the defendants in the Dennis case are charged as "co-conspirators but not defendants" in the indictments here. [A comparison of the allegations of the indictments at bar with those of the indictment in the Dennis case has been submitted by counsel for the defendants and is included as an appendix hereto.]

The gist of the conspiracy provisions of the indictments at bar is that the defendants and others "unlawfully, wilfully and knowingly did conspire • • • to commit offenses against the United States prohibited by Section 2 of the Smith Act • • • by so conspiring (1) unlawfully, wilfully and knowingly to advocate and teach • • • and (2) unlawfully, wilfully and knowingly to organize and help organize • • • in violation of Section 3 of the Smith Act • • •."

[1] As the Smith Act originally stood, § 3 prohibited a conspiracy to do "any of the acts" forbidden by the provisions of § 2, 54 Stat. 671 (1940). The Congress thus enacted in § 3 the old common law crime of conspiracy, which made the act of conspiring, without more, a public offense. Nash v. United States, 1913, 229 U.S. 373, 378, 33 S.Ct. 780, 57 L.Ed. 1232. Hence the doing of an overt act was not an essential element of the crime of conspiracy defined in § 3. See Dennis v. United States, supra, 341 U.S. at pages 574, 590, 71 S.Ct. 857.

[2] Sections 2 and 3 of the Smith Act later became §§ 10 and 11 of Title 18 of the United States Code, 54 Stat. 670 (1940). And when Title 18 of the United States Code was revised in 1948, the conspiracy section 3, 18 U.S.C. (1940 ed.) § 11, was repealed, 62 Stat. 867 (1948), leaving a conspiracy to commit the acts prohibited by § 2 of the Smith Act covered by the general conspiracy statute, 18 U.S.C. (1948 ed.) § 371, which does require as an essential element of the offense that an overt act be done "to effect the object of the conspiracy".

The defendants first direct attention to the last-above-quoted language of the indictments, namely, the allegations that they conspired "to commit offenses * * * prohibited by Section 2 of the Smith Act * * * by so conspiring * * * to advocate and teach * * *," as prohibited by § 2(a)(1), "and * * * to organize and help organize * * *," as prohibited by § 2(a)(3), "in violation of Section 3 of the Smith Act * * *." The substance of this, the defendants contend, is but to charge them with a conspiracy to commit a conspiracy. Cf. United States v. Armstrong, D.C., Ind.1920, 265 F.2d 683, 695.

The Government replies that the citation in the indictment of § 3 of the Smith Act is to be considered an error which, in keeping with Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., "shall not be ground for dismissal of the indictment", since the error has not misled the defendants to their prejudice. And the Government further urges that the language in question should be read as if the phrase "by so conspiring" consists of nothing more than the preposition "by," and as if the draftsman had employed the gerund or verbal noun rather than the infinitive of the verbs.

So read, the indictment charges that "the defendants * * * unlawfully, wilfully, and knowingly did conspire * * * to commit offenses * * * prohibited by Section 2 of the Smith Act * * * by * * * (1) unlawfully, wilfully, and knowingly" advocating and teaching "the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) [by] unlawfully, wilfully, and knowingly" organizing and helping to organize "as the Communist Party * * * persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence * * *."

But the defendants reply that even so reading the indictments, the essential elements of an offense are not charged. Specifically, the defendants assert that the requisite intent is not alleged.

The gravamen of the charge as laid in the indictments is that the defendants "unlawfully, wilfully, and knowingly did conspire * * * to commit offenses against the United States * * * by * * * unlawfully, wilfully and

knowingly" doing acts prohibited by § 2(a) (1) and § 2(a) (3) of the Smith Act.

[3] Since the adverb "unlawfully" is but a conclusion of the pleader that what was done was in violation of law cf. Keck v. United States, 1899, 172 U.S. 434, 437; 19 S.Ct. 254, 43 L.Ed. 505, the charge is of a conspiracy to commit offenses by doing precisely what is forbidden by the language of § 2(a) (1) and § 2(a) (3) of the Smith Act. See 54 Stat. 670, 671 (1940); 18 U.S.C. (1940 ed.) §10; id. (1948 ed.) § 2385.

Rule 7(c) of the Federal Rules of Criminal Procedure provides in part that: "The indictment • • • shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[4] "The general, and with few exceptions • • • the universal, rule, on this subject," said the Court in United States v. Hess, 1888, 124 U.S. 483, 486, 8 S. Ct. 571, 573, 31 L.Ed. 516, "is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

[5, 6] To repeat the classic quotation from the opinion of Mr. Chief Justice Waite in United States v. Cruikshank, 1875, 92 U.S. 542, 558, 23 L.Ed. 588. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself

of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

[7] However, as was said in Wong Tai v. United States, 1927, 273 U.S. 77, 80-81, 47 S.Ct. 300, 301, 71 L.Ed. 545: "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy • • •." See also Thornton v. United States, 1926, 271 U.S. 414, 423, 46 S.Ct. 585, 70 L.Ed. 1013; Williamson v. United States, 1908, 207 U.S. 425, 447-449, 28 S.Ct. 163, 52 L.Ed. 278.

[8] And where the language of the statute defining the offense charged is, "according to the natural import of the words, fully descriptive of the offense, then ordinarily it is sufficient" to charge a substantive offense by simply adopting or paraphrasing the words of the statute. Potter v. United States, 1894, 155 U.S. 438, 444, 15 S.Ct. 144, 146, 39 L.Ed. 214. Armour Packing Co. v. United States, 1908, 209 U.S. 56, 83-84, 28 S.Ct. 428, 52 L.Ed. 681.

[9] But as Mr. Justice Gray pointed out in United States v. Carll, 1881, 105 U.S. 611, 612-613, 26 L.Ed.

1135: "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In Ledbetter v. United States, 1898, 170 U.S. 606, 611-612, 18 S.Ct. 774, 776, 42 L.Ed. 1162, the court explained: "The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense * * *." See also United States v. Simmons, 1877, 96 U.S. 360, 362, 24 L.Ed. 819; United States v. Weber, D.C.N.D.Ill. 1947, 71 F.Supp. 88.

The gist of the first argument advanced by the defendants in support of their motions to dismiss is that "all of the elements necessary to constitute the offense intended to be punished" are not to be found in the language of the Smith Act; and since the indictments detail "in the words of the statute" the intended conduct by means of which the defendants purposed to commit the claimed offense they allegedly conspired to commit, an essential element of the charge is lacking.

[10] Specifically the defendants point to the fact that the language of the statute declares it to be an offense "knowingly or willfully" to engage in the proscribed

conduct. Whereas the Supreme Court was prompted to hold, in the light of the manifest purpose of the legislation and the inhibitions of the First Amendment, U.S. Const.Amend. I, "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." See Dennis v. United States, supra, 1951, 341 U.S. at page 499, 71 S.Ct. 857, 862.

The Government urges on the other hand the charge that the defendants "unlawfully, wilfully, and knowingly did conspire * * * to commit offenses * * * prohibited by the Smith Act * * * by so conspiring (1) unlawfully, wilfully, and knowingly to advocate and teach * * *" is sufficient to constitute an allegation of the "essential element * * * of the intent" to accomplish the overthrow.

[11] It is true that intent "may always be averted in general terms". Evans v. United States, 1894, 153 U.S. 584, 594, 14 S.Ct. 934, 939, 38 L.Ed. 839. But the specific inquiry here is whether the phrase "unlawfully, wilfully, and knowingly" either denotes or connotes the specific intent which has been held to be an essential element of any offense against the Smith Act.

"Unlawfully" as noted before is but a conclusion which means nothing more than allegedly contrary to law. Cf. Bannon v. United States, 1895, 156 U.S. 464, 466-467, 15 S.Ct. 467, 39 L.Ed. 494; Davis v. Utah, 1894, 151 U.S. 262, 266, 14 S.Ct. 328, 38 L.Ed. 153.

[12] To act "knowingly" means to act voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason. See United States v. Murdock, 1933, 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381.

[13] As stated in United States v. Illinois Cent. R. Co., 1938, 303 U.S. 239, 242-243, 58 S.Ct. 533, 535, 82 L.Ed. 773: "'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

Hence, to act "wilfully" means to act not only voluntarily and purposely but also with specific intent to violate the law, or with reckless disregard as to whether or not the act is a violation of law. Hartzell v. United States, 1944, 322 U.S. 680, 686-687, 64 S.Ct. 1233, 88 L.Ed. 1534; Screws v. United States, 1945, 325 U.S. 91, 101-107, 65 S.Ct. 1031, 89 L.Ed. 1495.

[14] If a conspiracy to bring about overthrow of the Government by force and violence were charged in the indictments at bar, it would be sufficient to allege that such a conspiracy was willful. Schenck v. United States, 1919, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; Hartzell v. United States, supra, 322 U.S. at pages 681, 686-687, 690, 691, 64 S.Ct. 1233. Indeed the mere allegation that the defendants conspired to commit the offense would denote wilfullness. Frohwerk v. United States, 1919, 249 U.S. 204, 208, 39 S.Ct. 249, 63 L.Ed. 561.

Here, however, the charge is of a conspiracy "• • • wilfully • • • to advocate and teach • • • and wilfully • • • to organize and help organize • • •." And it is urged the allegation that "the defendants • • • wilfully • • • did conspire • • • to commit offenses • • • prohibited by • • • the Smith Act • • •" is sufficient to carry with it every allegation of intent necessary to constitute the substantive offense.

[15] Where a conspiracy to commit an offense is charged, observed Mr. Chief Justice White (then As-

sociate Justice) in Williamson v. United States, supra, 207 U.S. at page 447, 28 S.Ct. at page 171, "the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." To the same effect, see Wong Tai v. United States, supra, 273 U.S. at page 81, 47 S.Ct. 300; and see Dennis v. United States, supra, 341 U.S. at pages 572-577, 71 S.Ct. 857.

Assuming then that the indictments here would be sufficient if the charge omitted all mention of the conduct by which, as well as the state of mind with which, the alleged conspirators purposed "to commit offenses * * * prohibited by Section 2 of the Smith Act," the fact is the draftsman did not choose to do so. Instead he chose to "descend to particulars", United States v. Cruikshank, supra, 92 U.S. at page 558, 23 L.Ed. 588, and allege in the language of the statute the means—both act and intent—whereby the alleged conspirators purposed "to commit offenses against the United States."

The result is the charge that the defendants conspired to commit the alleged offenses against the United States by means of (1) wilfully advocating and teaching, and by means of (2) wilfully organizing and helping to organize. Yet in Dennis v. United States, supra, 341 U.S. at pages 499, 509-511, 71 S.Ct. 857, it appears to have been expressly held that conduct proscribed by § 2 of the Smith Act which impinges upon freedom of speech, even though willful, cannot constitute an offense against the United States unless the acts be done with the specific intent to overthrow the Government by force and violence.

It is pointed out, however, that the indictment in the Dennis case, see id. sub nom. United States v. Foster, supra, D.C., 9 F.R.D. at pages 374-375, does not contain any allegation of intent to overthrow, which the Supreme Court characterized "as an essential element of the crime". See Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, 862. From that fact it is argued the court impliedly held that inclusion of such allegation is not essential to sufficiency of the indictment.

The question of failure of the indictment in the Dennis case to allege requisite intent was raised by the defense in the Court of Appeals, and the opinion there states "it is patent on the merest inspection that the indictment is sufficient". United States v. Dennis, supra, 2 Cir., 183 F. 2d at pages 207, 214-215. The question was also presented to the Supreme Court upon petition for certiorari, but the court expressly limited the scope of the writ to constitutional questions. Dennis v. United States, supra, 341 U.S. at pages 495-496, 71 S.Ct. 857. The Government nevertheless urges that "the Supreme Court necessarily had to pass on the sufficiency of the indictment" and "would have raised this issue *sua sponte* even though it had not been briefed."

The Government also points to the fact that the opinion states: "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow." Id. 341 U.S. at page 499, 71 S.Ct. at page 862.

It is true of course that "failure of the indictment * * * to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Fed. R. Crim. P. 12(b)(2). And the court would customarily pass upon that question before reaching constitutional issues. Cf. United States v. C.I.O., 1948, 335 U.S. 106, 110, 68 S.Ct. 1349, 92 L.Ed. 1849.

In the Dennis case, however, the Government urged upon appeal that because of arguments made and instructions requested by the defense, "they are in no position to claim that they were not fully advised of the element of specific intent in the charges brought against them."

In these circumstances the Court may well have concluded that any defect as to the allegations of intent in the indictment in the Dennis case did not "affect substantial rights" of the defendants, and for that reason should be "disregarded" in keeping with the mandate of Rule 52(a) of the Federal Rules of Criminal Procedure. See Rosen v. United States, 1896, 161 U.S. 29, 33-34, 41, 16 S.Ct. 434, 480, 40 L.Ed. 606; Price v. United States, 1897, 165 U.S. 311, 314-315, 17 S.Ct. 366, 41 L.Ed. 727; Gora v. Hawaii, 9 Cir., 1946, 152 F.2d 933, 935, certiorari denied, 1946, 328 U.S. 862, 66 S.Ct. 1362, 90 L.Ed. 1632; cf. United States v. Staats, 1850, 8 How. 41, 49 U.S. 41, 44, 12 L.Ed. 979.

[16] To hold then that "wilfully," as employed in the Smith Act and in the indictments at bar, denotes an "intent * * * to overthrow the Government by force and violence". Dennis v. United States, supra, 341 U.S. at

page 499, 71 S.Ct. at page 862, would seem to expand unduly the content of that already overworked adverb. Cf. Williams v. United States, 1951, 341 U.S. 97, 101, 71 S.Ct. 576, 95 L.Ed. 774; American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 413, 70 S.Ct. 764, 94 L.Ed. 925; Screws v. United States, supra, 325 U.S. at pages 101-107, 65 S.Ct. 1031; United States v. Ragen, 1942, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383; Omaechevarria v. Idaho, 1918, 246 U.S. 343, 348, 38 S.Ct. 323, 62 L.Ed. 763. Moreover, it could not reasonably be held that "wilfully" even so much as connotes the necessary time element—intent to cause forcible and violent overthrow "as soon as circumstances permit." See Dennis v. United States, 341 U.S. at page 518, 71 S.Ct. at page 872.

Corollary to the argument that the indictments omit to charge requisite intent, the defendants contend that: "The indictment fails to state an offense, in that it fails to allege facts disclosing a 'clear and present danger' from the defendants."

The defendants point to their unquestioned constitutional right "to be informed of the nature and cause of the accusation" against them, U.S.Const. Amend. VI, and the declaration in Foster v. United States, 9 Cir., 1918, 253 F. 481, 482: "To furnish them with that information it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general. * * * Here the statute is very general in its terms, and the indictment merely charges in the language of the statute."

And the defendants further cite Fontana v. United States, 8 Cir., 1919, 262 F. 283, 288 where the court said: "It is an elementary rule of criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime." See also United States v. Korner, D.C.S.D.Cal. 1944, 56 F.Supp. 242.

It was in Schenck v. United States, supra, 1919, 249 U.S. 47, 52, 39 S.Ct. 247, 249—which, like the Foster and Fontana cases just cited was a prosecution under the Espionage Act of 1917, 40 Stat. 217 (1917)—that the "clear and present danger" rule was announced in these words: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

"This is a rule of reason", wrote Mr. Justice Brandeis with the concurrence of Mr. Justice Holmes in Schaefer v. United States, 1920, 251 U.S. 466, 482-483, 40 S.Ct. 259, 264, 64 L.Ed. 360. And he added: "Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities."

[17] Rules of law expressed in the most absolute terms are always subject to such exceptions as are dictated by reason. See Dennis v. United States, supra, 341 U.S. at pages 524-525, 538-539, 71 S.Ct. 857. Our common-law system of justice is founded upon the idea that "reason, not arbitrary will, is to be the ultimate ground of decision." Pound, The Spirit of the Common Law, 1921, 182-183.

[18] The unqualified declaration in the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" has never been literally enforced. Robertson v. Baldwin, 1897, 165 U.S. 275, 281, 17 S.Ct. 326, 41 L.Ed. 715; Gompers v. United States, 1914, 233 U.S. 604, 610, 34 S.Ct. 693, 58 L.Ed. 1115. The right to speak and the right to print, like all legal rights under our system, are accompanied always by correlative legal duties to exercise those rights reasonably under the circumstances, and hence are subject to reasonable abridgements or restraints.

But we so prize freedom of expression—indeed deem it so essential to the maintenance of "a government of laws and not of men". See Abrams v. United States, 1919, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173; Dennis v. United States, supra, 341 U.S. at pages 544-546, 71 S.Ct. 857, that the bounds of restraint upon speech and press which will be tolerated as reasonable are narrow in the extreme. That narrowness is sought to be expressed in terms of a definite standard in the "clear and present danger" rule. To borrow the words of Mr. Justice Holmes in Abrams v. United States, supra, 250 U.S. at pages 630-631, 40 S.Ct. at page 22: "Only the emergency that makes

it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law * * * abridging the freedom of speech.' "

[19] It is within the bounds of reasonable abridgement of freedom of expression, as Mr. Chief Justice Hughes said in Near v. Minnesota, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 that: "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."

The learned justice who coined the "clear and present danger" phrase, also declared in Abrams v. United States, supra, 250 U.S. at page 627, 40 S.Ct. at page 21: "I do not doubt for a moment that * * * the United States constitutionally may punish speech that * * * is intended to produce a clear and imminent danger * * *." To the same effect, see Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; see also Chafee, Free Speech in the United States, 1941, 129-135; Richardson, Freedom of Expression and the Function of Courts, 1951, 65 Harv.L.Rev. 1.

[20] In the cases at bar, the "clear" danger envisioned in the Smith Act is the act of engaging in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of government by means of force or violence. Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857.

The "present" danger consists in the specific intent of advocate or teacher to accomplish the objective of forcible overthrow as speedily as possible. Id. 341 at pages 508-511, 71 S.Ct. 857.

The indictments here are clearly sufficient to comply with the constitutional requirement that the accused "be informed of the nature * * * of the accusation". U.S. Const. Amend. VI. So the burden of this phase of the argument must be that while the "nature" of the accusation may be known from the face of the indictment, the "cause" cannot be, since for all that appears the defendants could not be constitutionally prevented from expressing their beliefs in the form and manner and by the means alleged in the indictments.

To state it differently, the indictments charge that the defendants conspired to commit offenses against the United States by doing what the language of the statute forbids, and the Supreme Court has held in the Dennis case that in the face of the prohibitions of the First Amendment, such acts cannot be held to constitute an offense against the United States unless done with the intent to bring about overthrow of the Government by force and violence "as speedily as circumstances would permit." See Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, 862. Which appears to be but another way of saying that, while the facts as alleged may sufficiently disclose a "clear" danger of "bringing about the evil within the power of Congress to punish" [id. 341 at page 509, 71 S.Ct. at page 867], nothing at all is alleged in the indictments to charge that the "clear" danger is also a "present" one.

The Government's reply to these suggestions is that the adverb "wilfully" as used in § 2 of the Smith Act has been construed in the Dennis case to mean with "the intent * * * to overthrow the Government by force and violence." [Id. at pages 499-500, 71 S.Ct. at page 862].

Assuming such to be the content of "wilfully" as used in the Smith Act, that meaning can only serve to charge a "clear" danger, and the element of "present" danger is still missing from the indictments. Cf. Hartzell v. United States, supra, 322 U.S. at pages 686-687, 64 S.Ct. 1233.

It may well be, as the Government urges, the Dennis case should be interpreted as holding that "wilfully," as used in § 2 of the Act, denotes "with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit." See Dennis v. United States, supra, at pages 512, 499-500, 518, 71 S.Ct. at page 868.

But to import that language into these indictments by expanding the content of "wilfully" is to adopt a device for which there is but doubtful warrant; especially in face of the omission from the charging clauses of the indictments of any allegation suggesting the phrase "as speedily as circumstances * * * permit", and the inclusion of that time phrase in the latter portion of the indictments where it is alleged what the "schools and classes" would teach and advocate as a "further * * * part of said conspiracy."

Moreover, faced as we are in these cases with a long and expensive trial, it would seem rash to resolve this doubt in favor of the Government, and particularly so when it is recalled that the charging portions of the indictments contain an admittedly ambiguous sentence structure and an admittedly erroneous statutory citation.

[21, 22] For the reasons stated, caution added to grave doubt—*abundans cautela non nocet*—prompts the holding that the indictments do not allege the intent essential

to charge that the means claimed to be employed by the conspirators would, if pursued, constitute any criminal offense against the United States. "Conviction upon a charge not made would be sheer denial of due process." De Jonge v. Oregon, 1937, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278.

[23] Accordingly the motions of the defendants to dismiss the indictments will be granted. However, in view of the Government's contentions that the indictments as now drafted do in effect contain these allegations of requisite intent, and in view of the representations made at the bar that the prosecution expects to prove the defendants acted with this specific intent, the court will proceed upon the assumption that all defects in the existing indictments will be promptly cured.

Rule 12(b) (5) of the Federal Rules of Criminal Procedure provides in part: "If the court grants a motion based on a defect * * * in the indictment * * * it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment * * *."

Hence the court will order that the bail of each of the defendants who may be at liberty on bail be continued, and that each of the defendants in both cases, who may be in custody in default of bail, be held in custody, pursuant to Fed.R.Crim.P. 12(b) (5), for a period of ten days from this date pending the filing of a new indictment in each case.

Counsel for defendants will prepare and settle under local rule 7 within five days formal orders embodying the rulings herein made.

Appendix

A Comparison of the Indictments In Cases of Dennis, et al. and Schneiderman, et al.

Dennis Indictment:

The Grand Jury charges:

1. That from on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg, the defendants herein, unlawfully, wilfully, and knowingly, did conspire with each other, and with divers other persons to the Grand Jurors unknown, to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the

Schneiderman indictment:

The Grand Jury charges:

1. From and on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of California, and elsewhere, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as Abraham Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus Stack, and Mary Bernadette Doyle, the defendants herein, unlawfully, wilfully and knowingly did conspire with each other *and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein,* and with divers other persons to the grand jury unknown, *to commit offenses against the United States prohibited by Section 2*

United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940 (Section *10*, Title 18, United States Code), commonly known as the Smith Act..

(Note: order of stating the two objectives of conspiracy is reversed.)

of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) 10, and 18 U.S.C. (1948 Ed.) 2385, by so conspiring (1) *unlawfully*, wilfully and knowingly to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) unlawfully, wilfully, and knowingly to organize *and help organize* as the Communist Party of the United States of America a society, group, and assembly of persons who teac' and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) *11*, and 18 U.S.C. (1948 Ed.) *371;*

2. It was part of said conspiracy that defendants would convene, in the Southern District of New York, a meeting of the National Board of the Communist Political Association on or about June 2, 1945, to adopt a draft resolution for the purpose of bringing about the dissolution of the Communist Political Association, and for the purpose of organizing as the Communist Party of the United States of America a society, group, and assembly of persons dedicated to the Marxist-Leninist principles of the overthrow and destruction of

(no corresponding allegation)

the United States by force and violence.

3. It was further a part of said conspiracy that said defendants would thereafter convene, in the Southern District of New York, a meeting of the National Committee of the Communist Political Association on or about June 18, 1945, to amend and adopt said draft resolution.

(no corresponding allegation)

4. It was further a part of said conspiracy that said defendants would thereafter cause to be convened, in the Southern District of New York, a special National Convention of the Communist Political Association on or about July 26, 1945, for the purpose of considering and acting upon said resolution as amended.

(no corresponding allegation)

5. It was further a part of said conspiracy that said defendants would induce the delegates to said National Convention to dissolve the Communist Political Association.

(no corresponding allegation)

6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence,

(No corresponding allegation, except as covered by paragraph (1))

and would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism.

7. It was further a part of said conspiracy that said defendants *would bring about the election of officers and the election of a National Committee of said Party, and be elected as officers and as members of said National Committee and the National Board of said Committee,* and in such capacities said defendants would assume leadership of said Party and responsibility for its policies and activities, *and would meet from time to time to formulate, supervise and carry out the policies and activities of said Party.*

8. It was further a part of said conspiracy that said defendants would cause to be organized Clubs, and District and State units of said Party, and would recruit and encourage the recruitment of members of said party.

9. It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated, books,

(2) It was part of said conspiracy that said defendants and co-conspirators would become *members,* officers, and functionaries of *said Party, knowing the purposes of the Party,* and in such capacities would assume leadership in said Party and responsibility for *carrying out* its policies and activities *up to and including the date of the filing of this indictment;*

(3) It was further part of said conspiracy that said defendants and co-conspirators would cause to be organized *Groups,* Clubs, *Sections,* District and State Units of said Party *in the State of California and elsewhere* and would recruit and encourage recruitment of members of said Party, *concentrating on recruiting persons employed in key basic industries and plants;*

(4) It was further a part of said conspiracy that said defendants and co-conspirators would publish and circulate and cause to be published and

articles, magazines, and newspapers advocating *the principles of Marxism-Leninism.*

circulated books, articles, magazines, and newspapers *teaching* and advocating *the duty and necessity of overthrowing and destroying the Government of the United States by force and violence;*

(No corresponding allegation)

(5) It was further a part of said conspiracy that said defendants and co-conspirators would write and cause to be written articles and directives in publications of the Communist Party of the United States of America, including, but not limited to, "Political Affairs," "Daily People's World," "Daily Worker," and "The Worker," teaching and advocating the necessity of overthrowing the Government of the United States by force and violence;

10. It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for *the study of* the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

(6) It was further a part of said conspiracy that said defendants would conduct and cause to be conducted schools and classes for *indoctrination of recruits and members of said Party* in the principles of Marxism-Leninism in which would be taught and advocated the duty and necessity of overthrowing the Government of the United States by force and violence *as speedily as circumstances permit;*

(No corresponding allegation)

(7) It was further a part of said conspiracy that said defendants and co-conspirators would agree upon and carry

into effect detailed plans for the vital parts of the Communist Party of the United States of America to go underground in the event of emergency and from said underground position to continue in all respect the conspiracy described in paragraph (1);

(No corresponding allegation)

(8) It was further a part of said conspiracy that said defendants and co-conspirators would use false names, passports, and other false documents in order to conceal their identies and activities as members and functionaries of said Party;

(No corresponding allegation)

(9) It was further a part of said conspiracy that defendants and co-conspirators would do other and further things to conceal the existence and operations of said conspiracy; and

In pursuance of said conspiracy and to effect the objects thereof in the Southern District of California, the defendants and co-conspirators did commit, among others, the following

Overt Acts:

(No overt acts)

1. On or about July 17 and 18, 1948, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Al Richmond, also known as Abraham Richman, Loretta Starvus Stack, and

Mary Bernadette Doyle, defendants herein did attend and participate in a Convention of the Communist Party of the State of California at Park Manor, Sixth Street and Western Avenue, Los Angeles, California;

2. On or about August 20, 1948, Mary Bernadette Doyle, a defendant herein did attend and participate in a meeting of the Morgan Hull Club in San Diego, California;

3. On or about August 21, 1948, Loretta Starvus Stack, a defendant herein, did prepare and issue a directive and cause it to be circulated by the California State Committee of the Communist Party;

(No overt acts)

4. On or about August 21, 1948, Al Richmond, also known as Abraham Richman, a defendant herein, did issue a directive and cause it to be circulated by the California State Committee of the Communist Party;

5. On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting;

6. On or about May 20, 1949, Rose Chernin Kusnitz, a defendant herein, did attend and participate in a meeting held at 847 South Grand Avenue, Los Angeles, California.

7. On or about December 7, 1949, William Schneiderman and Dorothy Rosenblum Healey, defendants herein, did attend and participate in a meeting at Park View Manor, 2200 West Seventh Street, Los Angeles, California;

8. On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California;

9. On or about February 15, 1950, Mary Bernadette Doyle, a defendant herein, did attend and participate in a meeting held at 7891 Normandie Street, San Diego, California;

10. On or about April 6, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at 3875 City Terrace Boulevard, Los Angeles, California;

11. On or about June 12, 1950, Albert Jason Lima, a defendant herein, did attend and participate in a meeting at 2200 West Seventh Street, Los Angeles, California;

(No overt acts)

12. On or about June 24, 1950, Philip Marshall Connelly, Mary Bernadette Doyle, and Albert Jason Lima, defendants herein, did attend and participate in a meeting at Park

Manor, 607 South Western Avenue, Los Angeles, California;

13. On or about November, 1950, Ernest Otto Fox, also known as Ernest Otto Fuchs, did prepare and issue a directive and cause it to be circulated;

14. On or about April 9, 1951, Carl Rude Lambert, a defendant herein, did attend and participate in a meeting at 405 De La Guerra Street, Santa Barbara, California;

15. On or about July 24, 1951, Oleta O'Connor Yates, a defendant herein, did attend and participate in a meeting at 124 West Sixth Street, Los Angeles, California.

(No such conclusion, except as covered by paragraph (1))

In violation of Sections 3 and 5 of the Act of June 28, 1940 (Sections 11 and 13, Title 18, United States Code), commonly known as the Smith Act.

A True Bill

Jerome S. Blumauer
Acting Foreman

John F. X. McGohey
United States Attorney

A True Bill

Robert B. Young
Foreman

Ernest A. Tolin
United States Attorney

U. S. v. Schneiderman, et al., No. 21940.

Filed April 23, 1952 nunc pro tunc January 11, 1952, cited as 104 Fed. Supp. 405.

MATHES, District Judge.

Defendants, fifteen in number, stand charged with conspiracy to commit offenses against the United States, 18 U.S.C. § 371 prohibited by the Smith Act, 54 Stat. 670, Act June 28, 1940, 18 U.S.C. (1946 ed.) § 10, 18 U.S.C. (1948 ed.) § 2385, "by • • • advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence • • •."

In preparing their defense to that indictment defendants have caused the Clerk to issue a subpoena duces tecum pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., directing plaintiff and the United States Attorney to bring to the trial

> "All documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by the Grand Jury or Grand Juries which returned indictments herein, and (b) in the course of the Government's preparation for the trial of these causes, if such books, papers, documents and objects, (a) have been presented to the Grand Jury or Grand Juries; or (b) are to be offered as evidence on the trial of the defendants herein, or any of them, under said indictments."

Defendants have also filed a motion pursuant to Rule 17(c) for "an order fixing a time and place prior to the

trial * * * for the production and inspection of the * * * documentary evidence'' described in the subpoena duces tecum.

The Government has countered with a motion to modify the subpoena upon the ground inter alia that ''compliance would be unreasonable'' within the meaning of Rule 17(c). Specifically, the Government moves to modify the subpoena to such extent as may be necessary to provide ''adequate safeguards * * * to protect against disclosure of the identity of informants * * *.''

It is conceded that the United States Attorney has permitted the defense to inspect without contest a large number of documents. Indeed the Government contends it has now responded fully to the subpoena duces tecum, by permitting inspection of all except writings ''which cannot now be identified without danger of disclosing the identity of confidential informants * * * [and] documents intended for use as impeaching or rebuttal documents.''

The court has ordered these excepted writings delivered under seal to the judge for examination *in camera* cf. United States v. De Normand, 2 Cir., 1945, 149 F.2d 622, 625, certiorari denied, 1945, 326 U.S. 756, 66 S.Ct. 89, 90 L.Ed. 454; Id., 1947, 330 U.S. 822; 67 S.Ct. 769, 91 L.Ed. 1272; United States v. Cohen, 2 Cir., 1945, 148 F.2d 94, certiorari denied, 1945, 325 U.S. 852, 65 S.Ct. 1087, 89 L.Ed. 1972; United States v. Ebeling, 2 Cir., 1944, 146 F.2d 254, 257, and the questions now for determination are (1) whether defendants' motion for inspection in advance of trial should be granted as to the writings in dispute and (2) whether the subpoena duces tecum should be modified to the extent requested.

It is to be noted, as counsel for defense points out, "no claim is made * * * that the documents in question involve any state secrets [cf. 8 Wigmore, Evidence § 2378 (3d ed. 1940)], defense information or matters affecting the national security" cf. Zimmerman v. Poindexter, D.C.Hawaii, 1947, 74 F.Supp. 933. Nor is inspection sought to be denied by reason of any executive or administrative regulation or order, see Touhy v. Ragen, 1951, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417; Boske v. Comingore, 1900, 177 U.S. 459, 20 S.Ct. 701, 44 L.Ed. 846; Ex Parte Sackett, 9 Cir., 1935, 74 F.2d 922.

The Government invokes here the public policy favoring protection from disclosure of the identity of one who serves as an informer to law enforcement officials. See Scher v. United States, 1938, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; Vogel v. Gruaz, 1884, 110 U.S. 311, 316, 4 S.Ct. 12, 28 L.Ed. 158; 8 Wigmore, Evidence § 2374, 3d ed. 1940. But the "confidential informants," whose identity inspection of the disputed writings might disclose, are persons who may have testified before the grand jury which returned the indictment and will probably be called at the trial to lay evidentiary foundation for introduction of the documents. Thus they promise ultimately to become "something more" than mere informers. Cf. Sorrentino v. United States, 9 Cir., 1947, 163 F.2d 627; Wilson v. United States, 3 Cir., 1932, 59 F.2d 390. And of course their "confidential" character cannot survive their expected appearance as witnesses at the trial.

Defendants urge that in these circumstances they are entitled as of right to inspect the documents in question under the authority of Bowman Dairy Co. v. United

States, 1951, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879, since the subpoena at bar is "in the precise form and content" of the subpoena involved there. Such an interpretation of the opinion in that case would enlarge the holding as to what is "subject to subpoena" into a holding as to what may be inspected prior to trial.

In the Bowman opinion, after pointing out that Rule 16 of the Federal Rules of Criminal Procedure provides "a limited right of discovery," the Court declares that: "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. * * * Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." Id. 341 U.S. at page 220, 71 S.Ct. at page 679.

As observed in the opinion of the Court of Appeals, Id., 7 Cir., 1950, 185 F.2d 159, 162-163: "The history of the development of Rule 16 shows that the limitations appearing therein were deliberately inserted." Furthermore, the notes of the Advisory Committee appended to Rule 16, 18 U.S.C.A. p. 224 state that even with respect to the limited discovery therein provided: "The entire matter is left within the discretion of the court." See United States v. Schiller, 2 Cir., 1951, 187 F.2d 572, 575.

What a defendant may move to "inspect and copy or photograph" pursuant to Rule 16 is expressly limited to material "obtained from or belonging to the defendant or obtained from others by seizure or by process," and

such inspection is conditioned *ex vi termini* "upon a showing that the items sought may be material to the preparation of * * * defense and that the request is reasonable." What additional material may be subjected to a defendant's inspection prior to trial depends upon proper interpretation of the last sentence of Rule 17(c): "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

The sentence just quoted appeared in the preliminary draft of the rules as the last sentence of proposed Rule 20(b), and the appended note of the Advisory Committee explains: "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the interests of fairness and for the purpose of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed." Federal Rules of Criminal Procedure —Preliminary Draft pp. 104-105, 107-108 (1943).

[1] It seems clear then that whether materials subject to subpoena are to be produced and inspected prior to trial rests within the discretion of the trial court. Adopting a characterization from Mr. Chief Justice Marshall, defendants' motion to inspect is addressed "to the discretion of the court * * * not to its inclination,

but to its judgment; and its judgment is to be guided by sound legal principles." United States v. Burr, C.C.Va., 1807, 25 Fed.Cas. pages 30, 35, No. 14,692 d.

[2, 3] Proper exercise of discretion in dealing with the problem here requires that the public policy favoring protection of the identity of informers be weighed against the defendants' interest in an inspection of the documents preparatory to trial. See Langnes v. Green, 1931, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520; Dixie Cup Co. v. Paper Container Mfg. Co., 7 Cir., 1949, 174 F.2d 834, 836, certiorari denied, 1949, 338 U.S. 867, 70 S.Ct. 142, 94 L.Ed. 531. This involves a balancing of the inconvenience of disclosure in advance of trial against the inconvenience of preparing the defense without benefit of inspection. Cf. Shores v. United States, 8 Cir., 1949, 174 F.2d 838, 844-845. The latter factor is to be measured largely by an appraisal of the probative value of the writings—what inspection in advance of trial might mean to preparation of defense.

[4] Documents such as purported Communist Party membership cards would furnish scant aid to preparation of defense, other than to supply a partial list of intended prosecution witnesses. But only persons "charged with treason or other capital offense" are entitled as of right to be furnished "before commencement of trial" with names of "the witnesses to be produced on the trial for proving the indictment". 18 U.S.C. § 3432; Wayne v. United States, 8 Cir., 1943, 138 F.2d 1, certiorari denied, 1944, 320 U.S. 800, 64 S.Ct. 429, 88 L.Ed. 483; Jones v. United States, 9 Cir., 1908, 162 F. 417, 420, certiorari denied, 1908, 212 U.S. 576, 29 S.Ct. 685, 53 L.Ed. 657; United States v. General Petroleum Corp., D.C.S.D.Cal.

1940, 33 F.Supp. 95, 99; United States v. Pierce, D.C.N.D.N.Y.1917, 245 F. 888, 890.

Defendants press the fact, however, that the "documentary evidence, allegedly identifying the informant * * * has concededly been presented to the grand jury or will be offered into evidence at the trial * * * where disclosure of the identity of the informant will be made * * * in order to lay the foundation for the introduction of the document."

[5] Even if the informants were certain to be called as prosecution witnesses and their identities thus necessarily disclosed as defendants say "in a comparatively short period of time," it is my opinion that the public policy favoring protection of identity should operate to prevent disclosure prior to the time when the informer becomes witness. Ample basis in reason for this holding exists in the fact that the Government may finally elect not to use a given document rather than reveal the identity of the informer. See United States v. Coplon, 2 Cir., 1950, 185 F.2d 629, 638-639; United States v. Krulewitch, 2 Cir., 1944, 145 F.2d 76, 78-79, 156 A.L.R. 337; United States v. Andolschek, 2 Cir., 1944, 142 F.2d 503, 506.

[6] Moreover, the public policy under discussion only forbids non-essential disclosure. Disclosure may always be compelled in cases where identity of the informer appears "essential to the defense". Scher v. United States, supra, 305 U.S. at page 254, 59 S.Ct. at page 176; cf. United States v. Coplon, supra, 185 F.2d at pages 638-639; United States v. Grayson, 2 Cir., 1948, 166 F.2d 863, 870; Sorrentino v. United States, supra, 163 F.2d at page 627; United States v. Beekman, 2 Cir., 1946, 155 F.2d 580, 584; United States v. Andolschek, supra, 142

F.2d at page 506; Wilson v. United States, supra, 59 F.2d at page 392.

[7] Necessarily, then, denial of pretrial inspection does not preclude further applications for inspection during the course of the trial. See Shores v. United States, supra, 174 F.2d at page 844; United States v. Schiller, supra, 187 F.2d at page 575; cf. United States v. Krulewitch, supra, 145 F.2d at page 78.

[8] Furthermore, since defendants may not, as a matter of right, compel disclosure of the Government's evidence in advance of the trial, Goldman v. United States, 1942, 316 U.S. 129, 132, 62 S.Ct. 993, 86 L.Ed. 1322; United States v. Kushner, 2 Cir., 1943, 135 F.2d 668, 673, certiorari denied, 1943, 320 U.S. 212, 63 S.Ct. 1449, 87 L.Ed. 1850; United States v. Greater Kansas City, etc., Ass'n, D.C.W.D.Mo.1949, 85 F.Supp. 503, 512; United States v. Foster, D.C.S.D.N.Y.1948, 80 F.Supp. 479, 486, the court will take appropriate measures within judicial discretion to protect the rights of the defense in event of undue surprise. See Rubio v. United States, 9 Cir., 1927, 22 F.2d 766, 767-768, certiorari denied, 1928, 276 U.S. 619, 48 S.Ct. 213, 72 L.Ed. 734.

"Discretion" to borrow the language of Mr. Justice Sutherland, "denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily * * * but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green, supra, 282 U.S. at page 541, 51 S.Ct. at page 247.

[9] What has been said deals with pretrial inspection of writings intended "to be offered in evidence on the trial of the defendants." As to writings not to be used at the trial but which "have been presented to the Grand Jury," the policy against non-essential disclosure of informants is buttressed by the equally strong public policy favoring secrecy of grand jury proceedings. Goodman v. United States, 9 Cir., 1939, 108 F.2d 516, 519, 127 A.L.R. 265; In re Charge to Grand Jury, C.C.Cal.1872, 30 Fed.Cas. 992, 995, No. 18,255; United States v. American Medical Ass'n, D.C.D.C.1939, 26 F.Supp. 429, 430; United States v. Amazon Industrial Chemical Corp., D.C.Md.1931, 55 F.2d 254, 261.

[10, 11] As to writings intended to be used by the prosecution for rebuttal or impeachment purposes, there appears no good reason for pre-trial inspection. Such documents could not *ex natura rei* aid preparation of the defendants' case other than in a negative way. "The function of rebuttal", as the court observed in United States v. Crowe, 7 Cir., 1951, 188 F.2d 209, 213, "is to explain, repel, counteract or disprove adversary's evidence." And evidence introduced to impeach a witness is ordinarily limited to that purpose. Kemp v. Government of Canal Zone, 5 Cir., 1948, 167 F.2d 938, 940; United States v. Angelo, 3 Cir., 1946, 153 F.2d 247, 250-251; United States v. Graham, 2 Cir., 1939, 102 F.2d 436, 442, certiorari denied, 1939, 307 U.S. 643, 59 S.Ct. 1041, 83 L.Ed. 1524; Merrill v. United States, 9 Cir., 1925, 6 F.2d 120, 121.

It is to be remembered also that the prosecution cannot determine, until the defense has introduced witnesses and evidence, what if any rebuttal or impeachment will be

called for. Hence writings relating to possible rebuttal or impeachment are essentially in an area where the surprise element is unavoidable; and, moreover, desirable as a force tending to keep both sides within the narrow confines of the truth. See: The Practical Operation of Federal Discovery, 1952, 12 F.R.D. 131, 156-157; 3 Wharton, Criminal Evidence, pp. 2219-2222 (11th Ed. 1935); cf. Arnstein v. United States, 1924, 54 App.D.C. 199, 296 Fed. 946, 950, certiorari denied, 1924, 264 U.S. 595, 44 S.Ct. 454, 68 L.Ed. 867.

[12] The considerations just mentioned bespeak the soundness of the conclusion that avoidance of pitfalls in impeachment or rebuttal is not an end which pre-trial discovery is purposed to further. See Hickman v. Taylor, 1947, 329 U.S. 495, 507-508, 511-513, 519, 67 S.Ct. 385, 91 L.Ed. 451; Carpenter v. Winn, 1911, 221 U.S. 533, 541, 545, 31 S.Ct. 683, 55 L.Ed. 842; Alltmont v. United States, 3 Cir., 1950, 177 F.2d 971, 978, certiorari denied, 1950, 339 U.S. 967, 70 S.Ct. 999, 94 L.Ed. 1375; United States v. Rosenfeld, 2d Cir., 1932, 57 F.2d 74, 77, certiorari denied sub nom. Nachman v. United States, 1932, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290.

[13] For the above reasons, defendants' motion to inspect documentary evidence prior to trial will be granted as to Government's exhibits numbered for identification 1 to 214 inclusive; and denied as to Government's exhibits numbered for identification 215 to 251 inclusive. Plaintiff's motion to modify the subpoena duces tecum will be granted as to Government's exhibits numbered for identification 215 to 251 inclusive.

[14] All exhibits withheld from inspection and not offered in evidence at the trial shall be sealed by plaintiff

and filed with the Clerk, and shall remain secret under seal pending further order of court. Any exhibits so withheld and sealed shall, upon application of any defendant, be made part of any record on appeal in this cause for inspection *in camera* by the Court of Appeals, to enable the appellate court to determine whether inspection has been erroneously withheld. Cf. United States v. De Normand, supra, 149 F.2d at page 625.

U. S. v. Schneiderman, et al., No. 21940.

Filed May 6, 1952, cited as 106 Fed. Supp. 731.

MATHES, District Judge.

Defendants are on trial by jury under an indictment charging conspiracy, 18 U.S.C. § 371, to commit offenses against the United States prohibited by the Smith Act, 54 Stat. 670, Act June 28, 1940, 18 U.S.C.(1946 ed.) § 10, 18 U.S.C.(1948 ed.) § 2385, "by * * * organizing and helping to organize, as the Communist Party of the United States of America a * * * group of persons who advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence * * *."

One of the witnesses for the Government has testified on direct examination that he became a member of the Communist Party at Milwaukee, Wisconsin, where he engaged in various Communist Party activities and made written reports of such events to agents of the Federal Bureau of Investigation. Three of the reports relate to Communist Party gatherings concerning which the witness has testified in response to questions put by prosecution counsel. Defendants now move for an order

directing the Government to produce these three reports for inspection and use by the defense upon cross-examination of the witness.

The United States Attorney opposes the motion to produce upon the ground that such documents "are to be regarded as confidential" by virtue of regulations designated as "Department of Justice Order No. 3229,"*

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*"Order 3229

"Disclosure or Use of Confidential Records and Information

"May 2, 1939.

"Pursuant to authority vested in me by R.S. 161 (U.S.Code, Title 5, section 22), *It is hereby ordered:*

"All official files, documents, records and information in the office of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

"Frank Murphy,
"The Attorney General."

28 C.F.R. (1946 Supp.) § 51.71, 11 Fed. Reg. 4920 (1946); see 44 U.S.C. § 307.

"Order No. 3229
"Supplement No. 2

"June 6, 1947.

"To All United States Attorneys
Procedure To Be Followed Upon
Receiving A
Subpoena Duces Tecum

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for in-

issued by the Attorney General under authorization of 5 U.S.C.A. § 22 which provides in part that: "The head

structions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

"It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

"It is not necessary to produce the original document; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

"Tom C. Clark,
"Attorney General."

Pike & Fischer, Administrative Law (2d Series), Dept. of Justice 1.

of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department * * * and the custody, use, and preservation of the records, papers, and property appertaining to it."

[1, 2] The regulations relied upon are a part of "that body of public records of which the courts take judicial notice." Caha v. United States, 1894, 152 U.S. 211, 222, 14 S.Ct. 513, 517, 38 L.Ed. 415; 44 U.S.C.A. § 307. And having been held to constitute a valid exercise by the Attorney General of his authority under 5 U.S.C.A. § 22, Touhy v. Ragen, 1951, 340 U.S. 462, 463-464, note 1, 468-469, 71 S.Ct. 416, 95 L.Ed. 417, the regulations "have the force of law." Ex parte Reed, 1879, 100 U.S. 13, 22, 25 L.Ed. 538; Boske v. Comingore, 1900, 177 U.S. 459, 469, 20 S.Ct. 701, 44 L.Ed. 846; Ex parte Sackett, 9 Cir., 1935, 74 F.2d 922.

Exercising the discretion reserved to him in the regulations, the Attorney General, speaking through the United States Attorney at bar, takes the position that the Government cannot be required to produce for use by the defense "confidential" documents such as the three reports in question here.

The court has ordered the reports delivered under seal to the Clerk for inspection by the judge *in camera* to determine whether the documents have sufficient evidentiary value in any event to warrant disclosure to the defense. The Attorney General has complied with the order, and the reports have been marked as exhibits numbered for identification 729, 730 and 731, to be kept sealed pending further order of court. Cf. United States v. De Normand, 2 Cir., 1945, 149 F.2d 622, 625, certiorari

denied, 1945, 326 U.S. 756, 66 S.Ct. 89, 90 L.Ed. 454, id. 1947, 330 U.S. 822, 67 S.Ct. 769, 91 L.Ed. 1272; United States v. Cohen, 2 Cir., 1945, 148 F.2d 94, certiorari denied, 1945, 325 U.S. 852, 65 S.Ct. 1087, 89 L.Ed. 1972; United States v. Ebeling, 2 Cir., 1944, 146 F.2d 254, 257; United States v. Schneiderman, S.D.Cal., 1952, 104 F. Supp. 405.

It is urged in support of the pending motion that, notwithstanding the regulations of the Attorney General, defendants are entitled as of right to inspect the "F. B. I. reports" under authority of Bowman Dairy Co. v. United States, 1951, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879. On the other side the Attorney General contends that he is entitled as of right to withhold production and inspection and use of the reports under authority of the regulations.

[3] In my opinion neither contention is sound. The matter is one which *ex necessitate* must rest within the discretion of the trial court. See Crosby v. Pacific S. S. Lines, 9 Cir., 1943, 133 F.2d 470, 475, certiorari denied, 1943, 319 U.S. 752, 63 S.Ct. 1166, 87 L.Ed. 1706; Shores v. United States, 8 Cir., 1949, 174 F.2d 838, 844-845; United States v. Schiller, 2 Cir., 1941, 187 F.2d 572, 575-576; United States v. Schneiderman, supra, 104 F.Supp. at page 408; Wigmore, Evidence, § 2379 (3d ed. 1940).

[4] If a document material to the defense is of such a nature that the confidential information which it contains may be excised or by other means withheld from public disclosure without impairing the evidentiary value of the writing, the trial court will exercise discretionary powers to the end that the competing interests of both Govern-

ment and defense may be satisfied. See United States v. Burr, C.C.Va., 1807, 25 Fed.Cas. 187, 190-192, No. 14694.

[5] Where, however, the nature of the document or the character of its contents is such that the confidential information therein contained cannot fairly be withheld without diminishing the possible evidentiary value of the writing to the defense, then the court must determine in the excercise of discretion whether, notwithstanding the confidential information, the accused should be permitted to compel production of the document for use as evidence on behalf of the defense.

In United States v. Burr, supra, C.C.Va., 1807, 25 Fed. Cas. 187, 192, Id. 25 Fed. Cas. 30, No. 14692d, Mr. Chief Justice Marshall sat as Circuit Justice upon the trials of former Vice-President Aaron Burr charged with treason and high misdemeanor. The defense moved the court for an order directing issuance of a subpoena *duces tecum* to compel production of a letter then in the custody of the President, Thomas Jefferson.

The subpoena was awarded and, upon motion of the defense "that the cause should be continued until the letter should be produced," the venerable Chief Justice observed that "it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. * * * The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced * * *. In regard to the secrecy of these parts which it is stated are improper to give out to the

world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject."

[6, 7] The court's discretionary power to compel production of a document in the custody of a government agency must be exercised in the light of the requirement of the Sixth Amendment that: "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *." [U.S.Const. Amend. VI.] This constitutional mandate extends to documentary as well as oral evidence, United States v. Burr, supra, 25 Fed.Cas. at page 30, 35; see also Wilson v. United States, 1911, 221 U.S. 361, 372, 31 S.Ct. 538, 55 L.Ed. 771; 8 Wigmore, Evidence, §§ 2191, 2193, 2200 (3d ed. 1940); 3 Wharton, Criminal Evidence, §§ 1105, 1106 (11th ed. 1935).

[8] Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interest of the

accused in having the document for use in making a defense to the charge. See Langnes v. Green, 1931, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520. This involves a balancing of the inconvenience of public disclosure against the inconvenience of making a defense without the document. Cf. Shores v. United States, supra, 8 Cir., 174 F.2d at pages 844-845. The latter factor is to be measured largely by an appraisal of the probative or evidentiary value of the document—what possible use the defense could make of it for impeachment or other evidentiary purposes.

[9] If the possible evidentiary value of a document to the defense is clearly negligible, the trial court might well be prompted to hold that the interest of the accused in the use of the writing as evidence is outweighed by some public policy, such as that which favors protection from disclosure of the identity of an informer to law enforcement officials, cf. Scher v. United States, 1938, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, or that which favors protection of information affecting national security, cf. Zimmerman v. Poindexter, D.C.Hawaii, 74 F.Supp. 933, and other "secrets of state." See 8 Wigmore, Evidence, §§ 2367-2378a (3d ed. 1940).

[10] If, on the other hand, the possible evidentiary value is such that use of the document may fairly be considered "essential to the defense," the Government should be compelled to produce it. Scher v. United States, supra, 305 U.S. at page 254, 59 S.Ct. 174, 83 L.Ed. 151; United States v. Coplon, 2 Cir., 1950, 185 F.2d 629, 638-639, certiorari denied, 1952, 342 U.S. 920, 72 S.Ct. 362; United States v. Grayson, 2 Cir., 1948, 166 F.2d 863,

870; Sorrentino v. United States, 9 Cir., 1947, 163 F.2d 627; Wilson v. United States, 3 Cir., 1932, 59 F.2d 390, 392.

[11] Whenever the court is called upon to determine in the course of trial whether competent evidence, which appears relevant and material to the proof of some ultimate or evidentiary fact, will be "essential to the defense" in a criminal case, justice requires that doubt be weighed in favor of the defense. How essential the evidence may turn out to be raises a mere question of degree. If competent and relevant, and if material to any degree not clearly *de minimis*, both reason and policy advocate that the defense should be entitled to compel production of the evidence in fulfillment of the assurance of the Sixth Amendment. Cf. United States v. De Normand, supra, 149 F.2d at pages 625-626; United States v. Cohen, supra, 148 F.2d at page 94; United States v. Simonds, 2 Cir., 1945; 148 F.2d 177, 179.

To borrow again the words of Mr. Chief Justice Marshall in United States v. Burr, supra, 25 Fed.Cas. at page 191: "The question will recur, is it really material to his defence? The only evidence that can be received on this point is from the party himself, and he has made his affidavit to its materiality. But that is said to be insufficient; and why? Because the averment is, that the letter 'may be material' in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor. • • • It is objected that the particular passages of the letter

which are required are not pointed out. But how can this be done while the letter itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence? * * * Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge."

In the case at bar defendants urge that the reports should be held "essential to the defense" because the witness allegedly made use of the documents to refresh recollection prior to his appearance on the witness stand. The court finds however that the witness did not see the reports after sending them to the Federal Bureau of Investigation long prior to the trial, and did not make use of them for the purpose of refreshing recollection either in or out of court. See Goldman v. United States, 1942, 316 U.S. 129, 133, 62 S.Ct. 993, 86 L.Ed. 1322; United States v. Rappy, 2 Cir., 1946, 157 F.2d 964, 967-968, certiorari denied, 1947, 329 U.S. 806, 67 S.Ct. 501, 91 L.Ed. 688; Little v. United States, 8 Cir., 1937, 93 F.2d 401, 406, certiorari denied, 1938, 303 U.S. 644, 58 S.Ct. 643, 82 L.Ed. 1105; Mullaney v. United States, 9 Cir., 1936, 82 F.2d 638, 643; Lennon v. United States, 8 Cir., 1927, 20 F.2d 490, 494.

In considering the motion at bar I have examined *in camera* the three reports in question and find that although their possible evidentiary value to the defense appears to be slight indeed, it cannot be said that the documents are not to some degree "essential to the defense."

The Government nonetheless presses the contention that disclosure of one of the reports in particular [Exhibit 731] would reveal the identity of one or more confidential informants and so contravene the public policy which encourages private citizens to furnish public officials with information relating to violations of law. 8 Wigmore, Evidence, § 2374 (3d ed. 1940).

This sound public policy favors treatment of such information, and more particularly the identity of an informant, as confidential and privileged. Vogel v. Gruaz, 1884, 110 U.S. 311, 315-316, 4 S.Ct. 12, 28 L.Ed. 158; United States v. Li Fat Tong, 2 Cir., 1946, 152 F.2d 650, 652. As declared by the Supreme Court: "It is the duty and the right • • • of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. • • • It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government." In re Quarles and Butler, 1895, 158 U.S. 532, 535-536, 15 S.Ct. 959, 960, 39 L.Ed. 1080.

The only confidential informants whose identity might be revealed through public disclosure of the reports sought by the defense at bar are those asserted by the witness to have attended Communist Party gatherings. Yet on direct examination the witness himself was asked by the Government to name the persons present. Presumably if the witness' memory served him, any confidential informants present have already been named. If not, the Government's interrogation of the witness as to the event must be held a waiver of the right to invoke the public policy favoring protection from disclosure of the identity of any informant who may have been among persons present. Cf. Sorrentino v. United States, supra, 163 F.2d at page 627; Wilson v. United States, supra, 59 F.2d at page 390; United States v. Schneiderman, supra, 104 F.Supp. at page 405.

As the court put it in Wilson v. United States, supra, 59 F.2d at pages 391-392: "When the witness has been called by the United States, the trial court may modify the general doctrine by imposing the terms that consent to the disclosure be given or the witness be withdrawn and his testimony struck out as incomplete. • • • A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."

The problem remaining is whether, by virtue of the authority of "Department of Justice Order No. 3229" alone, the Attorney General is entitled to have withheld from public disclosure government papers under his

charge which appear to have some possible evidentiary value to the defense.

To quote Mr. Chief Justice Marshall further: "If it be apparent that the papers are irrelative to the case, or that for state reasons, they cannot be introduced into the defence, the subpoena *duces tecum* would be useless. * * * if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? * * * That there may be matter, the production of which the court would not require, is certain; but * * * that the accused ought, in some form, to have the benefit if it, if it were really essential to his defence, is a position which the court would very reluctantly deny." United States v. Burr, supra, 25 Fed.Cas. at pages 35, 37.

It is unnecessary however to reach the constitutional issue as to the extent of the authority of the Attorney General under the regulations, see Touhy v. Ragen, supra, 340 U.S. at page 469, 71 S.Ct. 416, 95 L.Ed. 417, since the question arises at the outset whether the Attorney General may not have waived any privilege of withholding the reports.

As Judge Learned Hand observed in United States v. Andolschek, 2 Cir., 1944; 142 F.2d 503, 506: "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings

to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively." See also United States v. Krulewitch, 2 Cir., 1944, 145 F.2d 76, 78-79, 156 A.L.R. 337; United States v. Beekman, 2 Cir., 1946, 155 F.2d 580, 584.

To paraphrase from the opinion in United States v. Coplon, supra, 185 F.2d at page 638: When the Government chooses to prosecute an individual for crime, it is not free to deny him the right to meet the charge against him by introducing relevant documents which the Government might otherwise claim to be privileged from public disclosure. And whenever the Government's claim of privilege conflicts with the right of the accused "to have compulsory process for obtaining witnesses [and other evidence] in his favor," U.S.Const.Amend. VI, the Attorney General must decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of "secrets of State" and other confidential information in the

Government's possession, which might be relevant to the defense. Cf. United States v. Burr, supra, 25 Fed.Cas. at pages 192-193.

The Government has made no suggestion that public policy against disclosure is sufficiently strong to warrant discontinuance of the prosecution or possible withdrawal of the witness and the striking of his testimony thus far given. Indeed, the Government in effect concedes that no "secrets of State" or other confidential information of importance is here involved.

[12] Accordingly, since the prosecution at bar, conducted under the supervision of the Attorney General [28 U.S.C. § 507(b)], has adduced evidence "touching the subject matter communicated" in the reports, it must be held that any privilege of withholding from inspection and use by the defense of sealed exhibits 729, 730 and 731 under authority of "Department of Justice Order No. 3229" has been waived. See Touhy v. Ragen, supra, 340 U.S. at pages 468, 469, 472-473, 71 S.Ct. 416, 95 L.Ed. 417.

[13] In all events, the Attorney General—no less than the United States Attorney—labors in every criminal prosecution under the solemn duty *ex mero motu* to see that "justice shall be done." Cf. Berger v. United States, 1935, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L.Ed. 1314. To that end he cannot properly withhold from the court evidence essential to proper disposition of the case, including *a fortiori* any evidence which may be material to the defense of the accused. See Canon 22, Canons of Professional Ethics, 62 A.B.A.Rep. 1112-1113 (1937).

Accordingly, defendants' motion to compel production of the reports for inspection and use of the defense upon cross-examination of the witness is granted, and the Clerk is ordered to unseal the documents heretofore marked for identification as exhibits 729, 730 and 731.

U. S. v. Schneiderman, et al., No. 21940.

Filed August 19, 1952, cited as 106 Fed. Supp. 892.

MATHES, District Judge.

Defendants are on trial under an indictment charging them as members of an alleged conspiracy to commit offenses against the United States, 18 U.S.C. § 371, prohibited by the Smith Act, 54 Stat. 670 (1940), 18 U.S.C. (1946 ed.) § 10; Id. (1948 ed.) § 2385, "by (1) wilfully * * * advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence * * * and by (2) wilfully * * * helping to organize as the Communist Party of the United States of America * * * a group * * * of persons who teach and advocate the overthrow * * * of the Government of the United States by force and violence, with the intent of causing the * * * overthrow * * * of the Government * * * by force and violence as speedily as circumstances would permit."

The prosecution has rested the case in chief, and the defendants have presented numerous motions to strike portions of the evidence. Although the specifications embraced within the motions are myriad, the grounds upon which the motions are rested may be categorized under relatively few headings.

It is urged that certain evidence should be stricken because any offense which might have been committed during the period to which it relates is barred by the statute of limitations. The indictment was brought on December 21, 1951, and the contention is advanced that no evidence should be admissible as to matters occurring before December 21, 1948, 18 U.S.C. § 3282, even though such matters may have occurred during the period covered by the indictment—i. e., since the effective date of the Smith Act on June 28, 1940, 54 Stat. 670 (1940). The prosecution replies *in summa* that the alleged conspiracy at bar is a continuing one, and hence should be treated as one conspiracy instead of several.

Reliance is thus placed on the statement of Mr. Justice Holmes in United States v. Kissel, 1910, 218 U.S. 601, 607, 31 S.Ct. 124, 126, 54 L.Ed. 1168, that "when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one." See also Brown v. Elliott, 1912, 225 U.S. 392, 400-401, 32 S.Ct. 812, 56 L.Ed. 1136.

[1] It is possible to misinterpret the language quoted as holding that whenever there is a "continuing conspiracy," there is in effect a tolling of the statute of limitations. Of course this is not true. Where as here there are two component elements of the offense—the agreement and an "act to effect the object of the con-

spiracy * * *" 18 U.S.C. § 371—both are essential to constitute a punishable crime. The agreement is the element which can be continuous, while the overt act, by its nature is of short duration. See Hyde v. United States, 1912, 225 U.S. 347, 387-391, 32 S.Ct. 793, 56 L.Ed. 1114 (dissenting opinion, Holmes, J.).

[2] Moreover, even though there may be a continuous agreement, as soon as an act is done "to effect the object" of that agreement, the crime of conspiracy is complete and an indictment for that offense must be found "within three years next after such offense shall have been committed." 18 U.S.C. § 3282; Pinkerton v. United States, 5 Cir., 1944, 145 F.2d 252, 254; Ware v. United States, 8 Cir., 1907, 154 F. 577, 12 L.R.A.,N.S., 1053, certiorari denied, 1907, 207 U.S. 588, 28 S.Ct. 255, 52 L.Ed. 353; see United States v. Bradford, E.D.La.1905, 148 F. 413, 418, 419, affirmed, 5 Cir., 1907, 152 F. 616, certiorari denied, 1907, 206 U.S. 563, 27 S.Ct. 795, 51 L.Ed. 1190.

[3] This does not mean that evidence of the conspiracy antedating the three-year period is not admissible, but rather that in order to convict the accused, the proof must establish that the agreement, shown to exist prior to the three-year period, continued in effect, and an overt act was committed, within the three-year period of the statute of limitations.

[4] Thus the doctrine of "continuing conspiracy" renders admissible evidence of the agreement and of overt acts beyond the three-year period—not to show the guilt of the accused at the time such acts were committed —but to show an illegal agreement, and any participation of a defendant in it, and his knowledge and intent; all to

aid determination by the jury of the issues raised by the indictment as to whether, within the three-year period, (1) the conspiracy existed, (2) the defendant was a party thereto with the knowledge and intent charged, and (3) an overt act was done "to effect the object of the conspiracy".

The problem at bar in this connection is made to appear somewhat complex by the circumstance that the date from which the three-year period should be measured is a matter of dispute. Originally, the defendants were charged under two separate indictments: one charging twelve defendants was filed on July 31, 1951; the other charging the remaining three—defendants Spector, Carlson and Dobbs—was not found until September 5, 1951. Both indictments were later dismissed because of a defect of law, United States v. Schneiderman, S.D. Cal. 1951, 102 F.Supp. 87, and the present indictment charging all fifteen defendants (the case as to defendant Doyle was later severed) was returned on December 21, 1951.

18 U.S.C. § 3288 declares that: "Whenever an indictment • • • is found • • • insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court • • • which new indictment shall not be barred by any statute of limitations."

And 18 U.S.C. § 3289 provides that: "Whenever an indictment is • • • found • • • insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which

such indictment was returned, a new indictment may be returned not later than the end of the next succeeding regular term of such court • • • which new indictment shall not be barred by any statute of limitations."

By virtue of 18 U.S.C. §§ 3288, 3289 the Government argues that evidence of any overt act occurring within three years of the original indictment should be received as proof of the overt act required by 18 U.S.C. § 371. The prosecution does not specify which original indictment should fix the starting date, but the earlier indictment of July 31, 1951, is the only one which could affect the result here, since overt acts 11 and 12 of the present indictment are alleged to have occurred on August 21, 1948, and so are the only ones which fall within the three-year period next preceding the indictment of July 31, 1951, and without the period applicable to the "new indictment."

[5] In any event the August 21, 1948 acts could not be shown as overt acts in the case against defendants Carlson, Dobbs and Spector, inasmuch as the original indictment charging them was not found until September 5, 1951. 18 U.S.C. § 3282.

[6] As to the remaining defendants, the conspiracy is alleged to have commenced "from on or about June 28, 1940" (the effective date of the Smith Act), and to have continued to and including the date of the finding of the present indictment (December 21, 1951). From the very terms of the quoted statute, the original indictments were not found insufficient "after the period • • • of limitations has expired", 18 U.S.C. § 3288, nor will such period "expire before the end of the next regular

term of the court to which such indictment was returned". 18 U.S.C. § 3289. Hence neither statutory provision relating back the date of filing of the "new indictment" is applicable here. See Fed.Rules Crim.Proc. rule 45(c), 18 U.S.C.A.

[7] This holding does not however render inadmissible evidence as to alleged overt acts antedating the three-year period immediately preceding the "new indictment." For such evidence is admissible as relevant to the issue *inter alia* of whether or not an illegal conspiracy existed within the applicable three-year period—in this case December 21, 1948 to December 21, 1951.

The motion to strike, as being beyond the statute of limitations, evidence relating to the period commencing with the effective date of the Smith Act on June 28, 1940 and ending with the commencement of the period of limitations herein on December 21, 1948 must be denied for the reasons stated.

[8] With respect to such evidence, the jury will be instructed in substance as follows:

Evidence as to alleged statements or declarations and teachings of instructors in alleged Communist Party schools, and as to certain alleged statements or declarations and acts of other alleged members of the Communist Party, said to have occurred after the Smith Act became law on June 28, 1940 has been received as being relevant to the issue of what was the nature and character and aims and objectives of the Communist Party during the three-year period immediately preceding the filing of the indictment on December 21, 1951. That is to say, such evidence as to alleged activities of the Communist Party

since June 28, 1940 may be considered in determining whether or not, during the three-year period prior to the finding of the indictment, the Communist Party of the United States of America was a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, as alleged in the indictment.

[9] The jury will be further instructed that if they find existence of the conspiracy charged in the indictment, and further find that all or any of the alleged club chairmen, teachers and others were knowingly and wilfully parties to or members of the conspiracy, then the acts thereafter done and the statements or declarations thereafter made by those whom the jury find to be members of the conspiracy may be considered in connection with the case of any defendant whom the jury also find to be a member of the conspiracy; and may be treated as if the acts or statements or declarations were done or made by such defendant, provided such acts were done and such statements or declarations were made during the continuance of the conspiracy and in furtherance of an object or purpose of the conspiracy.

[10] It is next urged that evidence of matters occurring prior to June 28, 1940—the effective date of the Smith Act, 54 Stat. 670 (1940)—should be stricken. The gist of the argument in support of this motion is that since *ex lege* there could not have existed prior to the Smith Act an illegal conspiracy for the purposes charged, there could be no admissible evidence of acts done or declarations made by alleged co-conspirators prior to the date of the Act.

Evidence as to pre-Smith Act declarations and acts of third persons might possibly be found to constitute conduct of persons in fact engaged at that time in a common enterprise with the defendants. Hitchman Coal & Coke Co. v. Mitchell, 1917, 245 U.S. 229, 249, 38 S.Ct. 65, 62 L.Ed. 260. In such case the agreement made prior to the Smith Act would, if continued, become *ipso facto* an illegal agreement thereafter; and such illegal post-Smith Act agreement and legal pre-Smith Act agreement would amount to the same conspiracy in fact. See Egan v. United States, 8 Cir., 1943, 137 F.2d 369, 381-382 certiorari denied, 1948, 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; cf. United States v. Reading Co., 1920, 253 U.S. 26, 43-45, 40 S.Ct. 425, 64 L.Ed. 760; Standard Oil Co. of New Jersey v. United States, 1911, 221 U.S. 1, 46-47, 31 S.Ct. 502, 55 L.Ed. 619; United States v. E. I. Du Pont De Nemours & Co., C.C.Del. 1911, 188 F. 127, 151-152.

In support of the argument for a ruling in accordance with such a concept of a pre and a post-Smith Act conspiracy identical in fact, the prosecution cites as precedent the handling of analogous testimony in United States v. Dennis, 2 Cir., 1950, 183 F.2d 201, 230, affirmed, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. There the defendants were charged with a violation of § 3 of the Smith Act, 54 Stat. 671 (1940)—conspiring to advocate the overthrow of the Government by force and violence. Whereas the defendants at bar are charged with a violation of 18 U.S.C. § 371—conspiring to commit offenses against the United States by violating 18 U.S.C. § 2385, which proscribes advocacy of the overthrow of the Government by force and violence.

It is urged in support of the Government's position that the difference between the charge in the Dennis case and that at bar is one of form only, necessitated by the repeal of § 3 of the Smith Act incident to revision of Title 18 of the United States Code as of September 1, 1948, 62 Stat. 867 (1948), Act June 25, 1948, § 21, 18 U.S.C.A. following section 5037; United States v. Schneiderman, S.D.Cal.1951, 102 F.Supp. 87, 90. The fact remains it would be legally impossible for the conspiracy charged in the indictment here to have existed as an illegal enterprise at any time prior to the effective date of the Smith Act on June 28, 1940.

Even though acts and declarations prior to June 28, 1940 are held not properly admissible as those of co-conspirators, such evidence is admissible in the case at bar upon another ground. One of the two means or methods which the defendants are charged with conspiring to employ in violating the Smith Act is "by * * * helping to organize as the Communist Party * * * a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government * * * by force and violence * * *." And since pre-Smith Act acts and declarations tend to disclose the nature and character and aims and objectives of the Communist Party during the pre-Smith Act period, such evidence is logically relevant to the issue raised by the indictment as to the nature and character and aims and objectives of the Communist Party during the post-Smith Act period covered by the indictment.

Testimony of witnesses as to acts and statements or declarations of certain of the defendants prior to June

28, 1940 is logically relevant to the issue as to whether or not the particular defendant named was a member of the Communist Party and had knowledge of the nature and character and aims and objectives of the Communist Party during the period covered by the indictment.

The defendants urge, however, that all pre-Smith Act evidence is irrelevant to any issue raised by the indictment at bar, because there is no basis in reason, they say, to draw any inference that activities which were admittedly legal prior to June 28, 1940 were continued after being declared illegal. See United States v. Oregon Medical Society, 1952, 343 U.S. 326, 332-333, 72 S.Ct. 690; Local 167 v. United States, 1934, 291 U.S. 293, 298, 54 S.Ct. 396, 78 L.Ed. 804; Cal.Code Civ.P. § 1963, subd. 32; 2 Wigmore, Evidence § 437 (3d ed. 1940); 1 Wharton, Criminal Evidence § 142 (11th ed. 1935).

[11] But as Wigmore has so clearly explained: "When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end." [2 Wigmore, Evidence § 437 (3d ed. 1940).]

As a rule, then, there is rational basis for assuming that the prior existence of certain facts which show the nature and character and aims and objectives of the Communist Party, and the knowledge thereof by certain defendants, prior to June 28, 1940 is "some indication of probable * * * continuance * * *." Even so, the question

remains as to the probability that the "intervening circumstance" of the passage of the Smith Act would "bring the existence to an end."

If some type of normal unconcealed business activity were involved, it would seem highly probable that an "intervening cause" making such activity illegal would strongly tend to bring such activity to an end. But where as here the activity sought to be proved—conspiracy to teach and advocate the necessity and duty of overthrowing the Government by force and violence as speedily as circumstances permit—is by its very nature covert and without regard for any law of the United States which might proscribe it, the degree of probability that passage of the Smith Act would "bring the existence to an end" seems low in the extreme.

[12] Accordingly, the defendants' motion to strike evidence of matters occurring prior to June 28, 1940 will be denied. However such evidence will be limited to the purposes stated, and the jury will be instructed in substance as follows:

Evidence has been received of alleged statements or declarations and teachings of instructors in alleged Communist Party schools, and of certain alleged statements or declarations and acts of other alleged members of the Communist Party, said to have occurred before the Smith Act became law on June 28, 1940.

Such evidence has been admitted as being relevant to the issue of what was the nature and character and aims and objectives of the Communist Party during the period covered by the indictment. That is to say, such evidence as to alleged activities of the Communist Party before

June 28, 1940 has been admitted to aid the jury in determining whether or not during the period covered by the indictment—that is during the years since June 28, 1940 and more particularly during the three-year period immediately preceding the filing of the indictment on December 21, 1951—the Communist Party of the United States of America was a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, as alleged in the indictment.

Otherwise than as such evidence may aid the jury in determining the nature and character and aims and objectives of the Communist Party during the time covered by the indictment as above stated, evidence of alleged activities prior to June 28, 1940 is not to be considered by the jury as tending to establish the truth of any of the allegations of the indictment, except in this one particular: evidence as to alleged activities of any defendant in the Communist Party before June 28, 1940 may be considered by the jury, as to that defendant only, in determining whether or not such defendant was a member of the Communist Party and had knowledge of the nature and character and aims and objectives of the Communist Party and of what may have been advocated and taught by the Communist Party during the period covered by the indictment. See People v. Steelik, 1921, 187 Cal. 361, 203 P. 78, 84; People v. Wagner, 3d Dist.1924, 65 Cal.App. 704, 225 P. 464, 468-469; People v. La Rue, 3d Dist.1923, 62 Cal.App. 276, 216 P. 627, 630; People v. Roe, 3d Dist. 1922, 59 Cal.App. 690, 209 P. 381, 384; cf.

Potlatch Lumber Co. v. Anderson, 9 Cir., 1912, 199 F. 742, 748.

[13] Next to be considered is the admissibility of evidence of the acts and conduct and declarations or statements, during the period covered by the indictment, of third persons alleged to be co-conspirators with the defendants. It is settled that, before such evidence may be considered, the evidence must first show the existence of the conspiracy. Glasser v. United States, 1942, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680; Bartlett v. United States, 10 Cir., 1948, 166 F.2d 920, 924; Mayola v. United States, 9 Cir., 1934, 71 F.2d 65, 67; Nibbelink v. United States, 6 Cir., 1933, 66 F.2d 178, 179.

[14-17] As was pointed out in Allen v. United States, 7 Cir., 1924, 4 F.2d 688, 691 certiorari denied, 1925, 267 U.S. 597, 598, 45 S.Ct. 352, 69 L.Ed. 806, 1925, 268 U.S. 689, 45 S.Ct. 509, 69 L.Ed. 1158: "A conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to

violate the law, a party knowingly co-operates to further the object of the conspiracy, he becomes a party thereto."

[18, 19] A conspiracy, like any other crime, can only be established by the various external manifestations of the parties—the acts and conduct and declarations or statements of third persons, taken together with the acts and conduct and declarations or statements of the defendants. Garhart v. United States, 10 Cir., 1946, 157 F.2d 777, 780-781. This does not mean that the existence of the conspiracy may be proved solely by the declarations or statements of the defendants themselves, for these might fall into the field of extra-judicial admissions and so require corroboration. Since conspiracy is the criminal offense charged, there must be some corroborating evidence of the existence of this corpus delicti *aliunde* the extra-judicial statements or declarations of the accused, United States v. Di Orio, 3 Cir., 1945, 150 F.2d 938, 940, certiorari denied, 1945, 326 U.S. 771, 66 S.Ct. 175, 90 L.Ed. 465; Anderson v. United States, 6 Cir., 1941, 124 F.2d 58, 65-66 reversed on other ground, 1943, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829; Cummings v. United States, 9 Cir. 1926, 15 F.2d 168, 169; cf Wiggins v. United States, 9 Cir. 1933, 64 F.2d 950, 951-952, certiorari denied, 1933, 290 U.S. 657, 54 S.Ct. 72, 78 L.Ed. 569; 3 Wigmore, Evidence § 821 (3d ed. 1940, 7 Id. §§ 2070-2071; 2 Wharton, Criminal Evidence §§ 640-641 (11th ed. 1935), except in cases where the incriminatory statements or declarations of the accused were made "prior to the crime," or themselves constitute the offense or an essential element thereof. See Warszower v. United States, 1941, 312 U.S. 342, 347-348, 61 S.Ct. 603, 85 L.Ed. 876;

cf. Yost v. United States, 4 Cir., 1946, 157 F.2d 147; Tabor v. United States, 4 Cir., 1945, 152 F.2d 254.

But there is no necessity to consider here whether an alleged statement or declaration of a defendant should be classed as a declaration before the occurrence of the crime, or as a statement constituting the crime, for there is abundant evidence *aliunde* declarations of the accused which, if believed, would be sufficient to show the existence of the conspiracy. See Glasser v. United States, supra, 315 U.S. at 80-81, 62 S.Ct. 457, 86 L.Ed. 680; Carlson v. United States, 10 Cir., 1951, 187 F.2d 366, 370-371, certiorari denied, 1951, 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367; United States v. Manton, 2 Cir., 1938, 107 F.2d 834, 839, certiorari denied, 1940, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012.

[20] If and when existence of the conspiracy is established, evidence as to membership in the conspiracy is the next problem to be faced. It is conceded that a defendant's membership must be shown without regard to and independent of the acts and statements or declarations of others, Glasser v. United States, supra, 315 U.S. at 74, 62 S.Ct. 457, 86 L.Ed. 680; May v. United States, D.C.Cir., 1949, 84 U.S.App. D.C. 233, 175 F.2d 994, 1007-1008, certiorari denied, 1949, 338 U.S. 830, 70 S.Ct. 58, 94 L.Ed. 505; Bartlett v. United States, supra, 166 F.2d at page 924; Mayola v. United States, supra, 71 F.2d at page 67; Minner v. United States, 10 Cir., 1932, 57 F.2d 506, 511; see also cases collected in United States v. United States Gypsum Co., D.D.C. 1946, 67 F.Supp. 397, 451-452.

But the defendants urge that the source of proof of the conspiracy membership of third-party declarants is subject not only to the limitation just stated, but also to the added limitation that third-party membership in the conspiracy must be shown without regard to and independent of the acts and statements or declarations of the third persons themselves. As claimed authority for this contention the defendants cite Glasser v. United States, supra, 315 U.S. at page 74, 62 S.Ct. 457. But the Glasser case is in no sense authority for the claimed limitation last stated. See May v. United States, supra, 84 U.S.App.D.C. 233, 175 F.2d at page 1008, n. 40.

What the defendants are thus arguing is that proof of participation of a third-party declarant in a conspiracy is analogous to proof of agency; that just as the hearsay declarations of a claimed agent may not be used to prove existence of the agency, Holland v. Cooper, 5 Cir., 1951, 192 F.2d 214, 216; Brownell v. Tide Water Associated Oil Co., 1 Cir., 1944, 12 1F.2d 239, 244; Nygard v. Dickinson, 9 Cir., 1938, 97 F.2d 53, 57, neither may the acts or declarations of third-party declarants be used to prove either existence of the conspiracy or the conspiracy membership of the third-party declarant.

True, the acts and declarations of one person may not serve as evidence of another's relationship as co-conspirator to an alleged conspiracy for reasons closely akin to those which give force to the rule that the extra-judicial declaration of a claimed agent may not be used to establish another's relationship as principal to an alleged agency. But there the analogy ceases, since admitting

evidence of acts and declarations of a third person to prove his own membership in a conspiracy permits such evidence to serve merely as proof of the relationship of the third-party actor or declarant himself—and not the relationship of any other person—to the conspiracy. Such acts and declarations thus lack the self-serving character of those which would establish the declarant's relationship to another person, and indeed possess the trustworthy character of statements against interest. See Donnelly v. United States, 1913, 228 U.S. 243, 272, 277-278, 33 S.Ct. 449, 57 L.Ed. 820, 5 Wigmore, Evidence §§ 1476-1477 (3d ed. 1940).

Moreover, the effect of what the defendants urge in this connection discloses plainly the fallacy of their position. If the conspiracy membership of third-party declarants may not be shown by the acts and statements or declarations of others and, under the rule for which the defendants contend, may not be shown through proof of their conduct, then acts and statements or declarations of co-conspirators simply could not be admitted in any conspiracy trial—a result in which the defendants themselves would not concur.

[21] In every prosecution for conspiracy, problems involving the admissibility of acts and statements or declarations of conspirators raise questions as to the competency of evidence. Whether the condition precedent that there be some evidence of the existence of the conspiracy *dehors* the statements or declarations of the accused, Cummings v. United States, supra, 15 F.2d at page 169; cf. Wiggins v. United States, supra, 64 F.2d at page 951-952, and whether "there is proof *aliunde*" acts and

statements or declarations of the third-party declarant that the the accused was "connected with the conspiracy", Glasser v. United States, supra, 315 U.S. at page 74, 62 S.Ct. 457, 467, are preliminarily issues of fact to be decided by the judge in determining whether acts and statements or declarations of an alleged co-conspirator are to be received as evidence against the accused.

[22] As Judge Learned Hand said in United States v. Dennis, supra, 183 F.2d at page 231: "* * * the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends * * *." Cf. D'Aquino v. United States, 9 Cir., 1951, 192 F.2d 338, 357; United States v. Kertess, 2 Cir., 1944, 139 F.2d 923, 929, certiorari denied, 1944, 321 U.S. 795, 64 S.Ct. 847, 88 L.Ed. 1084; Wynkoop v. United States, 9 Cir., 1927, 22 F.2d 799; Pearlman v. United States, 9 Cir., 1926, 10 F.2d 460, 462; Daeche v. United States, 2 Cir., 1918, 250 F. 566, 571.

Here, as in Clune v. United States, 1895, 159 U.S. 590, 592-593, 16 S.Ct. 125, 126, 40 L.Ed. 269, the prosecution is "seeking to establish a conspiracy by circumstantial testimony". And as Mr. Justice Brewer there said: "It is familiar law that where a case rests upon that character of evidence, much discretion is left to the trial court, and its ruling will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact." See also Delaney v. United States, 1924, 263 U.S. 586, 590, 44 S.Ct. 206, 68 L.Ed. 462; Wiborg v. United States, 1896, 163 U.S. 632, 657-658, 16 S.Ct. 1127, 41 L.Ed. 289; United States v. Von Clemm, 2 Cir., 1943,

136 F.2d 968, 971, certiorari denied, 1943, 320 U.S. 769, 64 S.Ct. 81, 88 L.Ed. 459.

[23-25] I find that there is at bar some evidence of the existence of the alleged conspiracy *dehors* the statements or declarations of the accused. I find also that there is proof *aliunde* acts and statements or declarations of third parties that the accused were members of the alleged conspiracy as charged.

The defendants' motion to strike evidence of acts and declarations of alleged co-conspirators, as such, must therefore be denied, and the jury will be instructed substantially as follows:

In your consideration of the evidence you should first determine whether or not the conspiracy existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine, as to each defendant, whether or not he or she was knowingly and willfully a party to or member of the conspiracy.

In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to the conspiracy membership of a particular defendant from any evidence as to his or her own statements or declarations and acts or conduct.

If you find that the alleged conspiracy did exist and that all or any of the defendants were members of such conspiracy as charged, you should then determine whether the alleged club chairmen, teachers and others mentioned in the testimony, but not named as defendants in the

indictment, were knowingly and willfully members of the conspiracy during the period of time covered in the indictment. In this determination, as in the determination of the conspiracy membership of any defendant, only the statements or declarations and acts or conduct of the person whose membership is in question, and not the statements or acts of others may be considered.

If and when the existence of the conspiracy charged in the indictment and the membership of all or any of the defendants in such conspiracy has been found, then the acts thereafter done and the statements or declarations thereafter made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy, even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

So if you conclude from the evidence that a defendant was a member of the conspiracy, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, including other defendants who you may find were members of the conspiracy, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment. But otherwise any admission or incriminatory statement made outside of court

by one defendant may not be considered as evidence against another defendant not present when the statement was made.

The defendants also seek to strike as allegedly improper the conclusions of several witnesses. Principal among these are conclusions to the effect that certain third persons were members of the Communist Party. So this motion presents the question whether the court should allow the witness briefly to state the result of his reasoning, or require him to detail the facts behind the conclusion, and allow the jury to find the result.

[26] The general rule is that if the facts underlying a conclusion may be easily stated and as stated will accurately reproduce to the jury what the witness has observed, then the conclusions should not be allowed. If, however, such a practice has the effect of only verbally tongue-tying the witness or of making it impossible for the witness to convey to the jury what he has observed, then statement of a conclusion should be allowed. United States v. Petrone, 2 Cir., 1950, 185 F.2d 334, 336, certiorari denied, 1951, 340 U.S. 931, 71 S.Ct. 493, 95 L.Ed. 672; United States v. Cotter, 2 Cir., 1932, 60 F.2d 689, 693-694, certiorari denied, 1932, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575; Nichols v. United States, 5 Cir., 1931, 48 F.2d 46, 49; Central R. Co. of New Jersey v. Monahan, 2 Cir., 1926, 11 F.2d 212, 214; Manney v. Housing Authority of City of Richmond, 79 Cal.App.2d 453, 180 P.2d 69, 73 (1947); 7 Wigmore, Evidence § 1924 (3d. ed. 1940).

[27] In the case at bar, unless the witness happened to be keeper of the membership rolls of the Communist Party, it is difficult to envision a recital of the facts

showing how he knew a certain person was a party member. To determine who was a party member, where as here direct indicia of membership do not appear to have existed, in reality is but a matter of showing association and of stating how the person was known to the witness. Thus the conclusions in question were necessary as a matter of practicality, and the remedy of the defendants was by way of full cross examination, cf. United States v. Petrone, supra, 185 F.2d at page 336; United States v. Stoehr, M.D.Pa. 1951, 100 F.Supp. 143, 156, not by motion to strike.

[28] The defendants also move to strike certain documentary evidence as barred by the doctrine of res judicata. In this connection it is claimed that certain allegedly basic Communist works, such as Foundations of Leninism by J. Stalin, State and Revolution by V. I. Lenin, the History of the Communist Party of the Soviet Union, and the Communist Manifesto by Karl Marx have already been litigated in the case of Schneiderman v. United States, 1943, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796, and may not therefore be re-litigated here. The former Schneiderman case was a civil action brought by the Government under the provisions of § 15 of the Act of June 29, 1906, 34 Stat. 596, 8 U.S.C.A. § 405, to cancel the defendant Schneiderman's certificate of citizenship which had been granted in 1927.

In that action the complaint charged defendant Schneiderman had illegally procured his naturalization certificate in that at the time of his naturalization and during the five years preceding his naturalization he "had not behaved as a person attached to the principles

of the Constitution of the United States and well disposed to the good order and happiness of the United States, but in truth and in fact during all said time, [he] was a member of and affiliated with and believed in and supported the principles of organizations then known as the Workers (Communist) Party of America and the Young Workers (Communist) League of America, whose principles were opposed to the principles of the Constitution of the United States and * * * advocated and taught the overthrow of the Government, Constitution and Laws of the United States by force and violence."

The lower court's determination that Schneiderman's citizenship certificate should be cancelled was reversed by the Supreme Court because "the Government has not proved by 'clear, unequivocal and convincing' evidence that the naturalization court could not have been satisfied that petitioner was attached to the principles of the Constitution when he was naturalized." Schneiderman v. United States, supra, 320 U.S. at page 142, 63 S.Ct. 1333, 1345.

Patently such litigation of the documents in question could not touch the manner in which the writings might be used in the future. That a person may have been acquitted of murder with a certain gun would not bar the prosecution from introducing the identical gun should that person use it in another killing. By the same token since the defendants at bar have allegedly used the documents in question in an illegal manner since 1927, nothing adjudicated as of 1927 could serve to bar the introduction of such documents upon the trial of the later charge.

[29] Accordingly, the motion to strike grounded upon the plea of res judicata will be denied, and the jury will be instructed substantially as follows:

During the course of the trial there have been various references to the case of Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796. That case was not a prosecution under the Smith Act, and the Supreme Court did not there determine any of the issues raised by the indictment here.

Evidence as to that case was received on the issue of intent in this case, and is to be considered insofar as it may aid determination of that issue here.

[30, 31] During the course of the examination of prosecution witnesses, occasionally a witness has answered a question not put, or has volunteered testimony not responsive to the pending question. The defendants now seek to strike such answers as being non-responsive.

Wigmore holds that the objection of non-responsiveness is not, as such, a ground for the exclusion of testimony, declaring that neither questioning nor opposing attorney should be permitted to make this objection since "No party is owner of facts in his private right. No party can impose silence on the witness called by Justice." Wigmore, Evidence § 785 (3d ed. 1940).

While it is true that neither side has the right to suppress the truth, it is an obvious requisite of orderly procedure that each side have a voice in determining the order in which the truth shall be told. If the questioning attorney attempts to suppress the truth, opposing counsel can bring it out on cross or re-direct examination.

But to deny the questioning attorney the privilege of having non-responsive answers stricken would make the course of direct examination infinitely more difficult and render cross examination virtually useless.

These considerations point to the desirability of the rule that counsel who is not conducting the questioning has no standing to ask that a non-responsive answer be stricken upon the sole ground of lack of responsiveness. Parente v. United States, 8 Cir., 1936, 82 F.2d 722, 724; Page Steel & Wire Co. v. Blair Engineering Co., 3 Cir., 1927, 22 F.2d 403, 406, certiorari denied, 1928, 276 U.S. 623, 48 S.Ct. 303, 72 L.Ed. 737; Ridenour v. United States, 3 Cir., 1926, 14 F.2d 888, 891; Holzer v. Read, 1932, 216 Cal. 119, 122, 13 P.2d 697, 698; Hirshfeld v. Dana, 1924, 193 Cal. 142, 148, 223 P. 451, 453-454; but see Cal.Code Civ.Proc. § 2056; Westman v. Clifton's Brookdale, 2 Dist. 1948, 89 Cal.App.2d 307, 200 P.2d 814; cf. Burns v. California Milk Transport, 2 Dist. 1948, 89 Cal. App.2d 70, 200 P.2d 43; People v. Geibel, 2 Dist. 1949, 93 Cal.App.2d 147, 208 P.2d 743. Accordingly, the defendants' motion to strike certain evidence solely upon the ground of lack of responsiveness to a pending question will be denied.

[32] Last to be considered is evidence which is claimed to be too remote and prejudicial in relation to its relevance. Such evidence embraces alleged activity in other organizations than the Communist Party, alleged activity of various defendants and other alleged members of the Communist Party on matters of foreign policy and highly controversial domestic matters, evidence of isolated incidents which do not tend to show the nature and char-

acter or aims and objectives of the Communist Party, and evidence of other matters only remotely relevant to the issues at bar. See 1 Wharton, Criminal Evidence §§ 227, 230 (11th ed. 1935).

In a case such as this, where issues are raised as to the nature and character and aims and objectives of the Communist Party, as well as the intent of the defendants in matters of advocacy, there is very little which may not correctly be said to be in some degree relevant. It is my opinion however that proper exercise of judicial discretion requires striking from the record those matters which might lead the jury down a collateral issue or might tend to subject them to some prejudice, even though the evidence involving such matters might be technically relevant. See United States v. Werner, 2 Cir., 1947, 160 F.2d 438, 443; Metropolitan Life Ins. Co. v. Armstrong, 8 Cir. 1936, 85 F.2d 187, 193; Kettenbach v. United States, 9 Cir., 1913, 202 F. 377, 384, certiorari denied, 1913, 229 U.S. 613, 33 S.Ct. 772, 57 L.Ed. 1352; United States v. Stoehr, supra, 100 F.Supp. at page 155; 1 Wharton Criminal Evidence § 370 (11th ed. 1935).

The considerations just stated prompt the granting of many of the defendants' motions to strike which are specified in the accompanying order. All pending motions to strike which are not expressly granted in the accompanying order are hereby denied.

U. S. v. Schneiderman, et al., No. 21940.

Filed August 18, 1952, cited as 106 Fed. Supp. 906.

MATHES, District Judge.

Fourteen defendants herein have been tried and found guilty by the jury of conspiring to commit offenses against the United States, 18 U.S.C.A. § 371, prohibited by the Smith Act, 54 Stat. 670 (1940); 18 U.S.C.(1946 ed.) § 10; id. (1948 ed.) § 2385, "by (1) wilfully * * * advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence * * * and by (2) wilfully * * * helping to organize as the Communist Party of the United States of America * * * persons who teach and advocate the overthrow * * * of the Government of the United States by force and violence, with the intent of causing the * * * overthrow * * * of the Government * * * by force and violence as speedily as circumstances would permit."

At the close of the Government's case in chief, the defendants moved for a judgment for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and this motion was denied. Upon the close of the evidence, the motion was renewed, ruling was reserved, and the case was submitted to the jury. The defendants now urge that the motion be granted and a judgment of acquittal entered notwithstanding the verdict, Fed.R.Crim.P. 29(b). An alternative motion for a new trial, Fed.R.Crim.P. 33, and a motion in arrest of judgment, Fed.R.Crim.P. 34, are also presented.

Rule 29(a) directs the court to "order the entry of judgment of acquittal * * * if the evidence is insufficient

to sustain a conviction * * *." The rule is silent as to the test to be applied in measuring the sufficiency of the evidence to sustain a verdict of guilty.

[1] In Curley v. United States, D.C. Cir., 1947, 81 U.S.App.D.C., 160 F.2d 229, 232, certiorari denied, 1947, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 the court states: "The true rule * * * is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

[2] There is an apparent conflict between the view thus expressed in Curley v. United States, supra, 160 F.2d at page 232, and that expressed in United States v. Feinberg, 2 Cir., 1944, 140 F.2d 592, 594, certiorari denied, 1944, 322 U.S. 726, 64 S.Ct. 943, 88 L.Ed. 1562, where Judge Learned Hand declared "the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and * * * given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt."

[3] But the "true rule" of the Curley case and the "standard of evidence" set up in the Feinberg case are found upon analysis to be one and the same. See United States v. Cohen, 2 Cir., 1944, 145 F.2d 82, 86, certiorari denied, 1945, 323 U.S. 799, 65 S.Ct. 553, 89 L.Ed. 637;

United States v. Andolschek, 2 Cir., 1944, 142 F.2d 503, 504. Both are obviously intended to clarify the oft-stated requirement that there must be "substantial evidence" of guilt to warrant submission of the case to the jury. Cf. Pierce v. United States, 1920, 252 U.S. 239, 251, 40 S.Ct. 205, 64 L.Ed. 542; Stoppelli v. United States, 9 Cir., 1950, 183 F.2d 391, 393, certiorari denied, 1950, 340 U.S. 864, 71 S.Ct. 88, 95 L.Ed. 631; Crono v. United States, 9 Cir., 1932, 59 F.2d 339, 340.

[4, 5] As Judge Sanborn explained in Isbell v. United States, 8 Cir., 1915, 227 F. 788, 792-793: "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. * * * This is the only question the court is required or permitted to determine * * * and where there [is] any substantial evidence inconsistent with the innocence of the accused, although it may have been contradicted and overwhelmed by the testimony to the contrary, the weight of the evidence, the credibility of the witnesses and the guilt or innocence of the defendant are left to the determination of the jury."

[6] Under our common-law system of justice the ultimate standard in the application of every rule is one of reasonableness. See Funk v. United States, 1933, 290 U.S. 371, 383-385, 54 S.Ct. 212, 78 L.Ed. 369; Pound, The Spirit of the Common Law, 182-183 (1921); Pound, Justice According to Law, 60 (1951).

[7] In keeping with that standard the test in every case must be whether the evidence is such that the jury

might reasonably base a finding of guilt thereon. If so, the evidence in support of the charge is held to be substantial and sufficient to sustain a conviction. Stoppelli v. United States, supra, 183 F.2d at pages 393-394; cf. Tennant v. Peoria etc. Ry. Co., 1944, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520; Sioux City & P. Railroad Co. v. Stout, 1873, 17 Wall. (84 U.S.) 657, 663-665, 21 L.Ed. 745.

[8] To apply the test—to review the evidence and determine whether the jury might reasonably base a finding of guilt thereon—involves three steps: *First*—finding every fact which the jury might reasonably find from the evidence in support of the verdict; *Second*—finding every fact which the jury might reasonably infer from all facts which the jury might reasonably find have been proved—i.e. drawing "justifiable" or reasonable inferences of fact; and *Third*—determining whether all facts which reason permits to be found from the evidence in favor of conviction plus all facts which reason permits to be inferred therefrom are sufficient to enable a jury reasonably to find every essential element of the charge.

[9] If the facts which reason permits to be found from the evidence and the inferences which reasonably may be drawn therefrom can be combined to make out proof of the crime charged, the evidence must be held sufficient to sustain a conviction and the motion for judgment of acquittal accordingly denied.

[10] For if the evidence be such that the verdict of guilt falls within the bounds of reason—within that realm of the debatable where reasonable persons may differ—then the decision of the jurors as judges of the facts must stand, unless it appear that the force of some extra-

neous circumstance or influence prevented the jurors from functioning as the law contemplates a jury should function. See Mattox v. United States, 1892, 146 U.S. 140, 147-150, 13 S.Ct. 50, 36 L.Ed. 917; Rakes v. United States, 4 Cir., 1948, 169 F.2d 739, 745, certiorari denied, 1948, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380; Baker v. Hudspeth, 10 Cir., 1942, 129 F.2d 779, 782, certiorari denied, 1942, 317 U.S. 681, 63 S.Ct. 201, 87 L.Ed. 546; cf. Dennis v. United States, 1950, 339 U.S. 162, 171-172, 70 S.Ct. 519, 94 L.Ed. 734; Frazier v. United States, 1948, 335 U.S. 497, 513, 69 S.Ct. 488, 93 L.Ed. 1072; Clark v. United States, 1933, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993; United States v. Ball, 1896, 163 U.S. 662, 674, 16 S.Ct. 1192, 41 L.Ed. 300.

[11] Applying the stated test in the case at bar, it would seem beyond contention that the jury might reasonably have found from the evidence that the Communist Party is a "group * * * of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence with the intent of causing the * * * overthrow and destruction of the Government * * * by force and violence as speedily as circumstances would permit."

Indeed, there is persuasive argument that such is the common notoriety of this alleged objective of the Communist Party that the courts might properly take judicial notice of it. See Internal Security Control Act of 1950, § 2, 64, Stat. 987 (1950), 50 U.S.C.A. § 781(15); H.R.Rep. No. 2980, 81st Cong., 1st Sess. (1950); Dennis v. United States; 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; Joint Anti-Fascist Refugee Committee v. McGrath, 1951,

341 U.S. 123, 195, 71 S.Ct. 624, 95 L.Ed. 817; American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; Schneiderman v. United States, 1943, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796; Martinez v. Neely, 7 Cir., 1952, 197 F.2d 462, certiorari filed July 21, 1952; Carlson v. Landon, 9 Cir., 1951, 187 F.2d 991, 997, affirmed, 1952, 342 U.S. 524, 72 S.Ct. 525; United States ex rel. Yokinen v. Commissioner, 2 Cir., 1932, 57 F.2d 707, certiorari denied, 1932, 287 U.S. 607, 53 S.Ct. 11, 77 L.Ed. 528; Murdoch v. Clark, 1 Cir., 1931, 53 F.2d 155, 157; Ungar v. Seaman, 8 Cir., 1924, 4 F.2d 80, 81; In re MacKay, N.D.Ind.1947, 71 F.Supp. 397, 398-399; United States ex rel. Fortmueller v. Commissioner, S.D. N.Y.1936, 14 F.Supp. 484, 487; Ex parte Jurgans, D.Minn. 1927, 17 F.2d 507, 511, affirmed sub nom. Jurgans v. Seaman, 8 Cir., 1928, 25 F.2d 35; cf. Northern Trust Co. v. C. I. R., 7 Cir., 1940, 116 F.2d 96, 98; United States v. Polzin, D.Md.1942, 48 F.Supp. 476, 478; see also Carroll v. United States, 1925, 267 U.S. 132, 159-160, 45 S.Ct. 280, 69 L.Ed. 543; Brown v. Piper, 1875, 91 U.S. 37, 43, 23 L.Ed. 200; Morgan, Judicial Notice, 57 Harv.L.Rev. 269 (1944); 9 Wigmore, Evidence §§ 2565-2583 (3d ed. 1940); Holdsworth, A History of English Law, Vol. IX, pp. 135-139 (1944); Strahorn, The Process of Judicial Notice, 14 Va.L.Rev. 544 (1928); Thayer, A. Preliminary Treatise on Evidence at the Common Law, 277-312 (1898). Contra: Stasinkevich v. Nicolls, 1 Cir., 1948, 168 F.2d 474, 479-480.

The evidence establishes without dispute that the defendants were members and officers or functionaries of varying degrees of standing and activity in the Communist Party during the period covered by the indict-

ment. It is true of course, as § 4(f) of the Internal Security Act of 1950, 64 Stat. 987, 992 (1950), 50 U.S.C.A. § 783(f), provides, that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation • • • of any • • • criminal statute." But the conviction here does not rest upon the mere fact that the defendants were members and officers of the Communist Party.

Rather the conviction at bar must be grounded upon the fact that it was reasonable to infer, from the evidence as to the fact and nature of their connections with and conduct in the Communist Party, that each of the defendants actively and understandingly supported the aims and objectives of the Communist Party, including that of teaching and advocating the necessity and duty of overthrowing and destroying the Government of the United States by force and violence, and helped to promote the organizational growth and the functioning of the Communist Party; all with the intent of causing or bringing about the forcible and violent overthrow and destruction of the Government as speedily as circumstances would permit.

[12, 13] From all the evidence in the case as to the nature and character and aims and objectives of the Communist Party, and the activities of those connected with that organization, it must be held that the jury with reason found the existence of the conspiracy charged in the indictment. Glasser v. United States, 1942, 315 U.S. 60, 80-81, 62 S.Ct. 457, 86 L.Ed. 680; Carlson v. United States, 10 Cir., 1951, 187 F.2d 366, 370-371, certiorari denied, 1951, 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367; United

States v. Manton, 2 Cir., 1938, 107 F.2d 834, 839, certiorari denied, 1940, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012. And from all the evidence as to each of the defendants' connection with and conduct in the Communist Party, the jury was entitled with equal reason to infer that each defendant was a member of the conspiracy with the specific intent charged in the indictment.

But the defendants urge the case at bar is a "free speech case," and hence that stricter proof must be required in keeping with the "clear and present danger" rule.

[14] As pointed out in United States v. Schneiderman, S.D.Cal.1951, 102 F.Supp. 87, 95-96, the "clear and present danger" rule is intended to serve as the standard to be applied in testing the constitutionality on its face of a statute which restrains freedom of expression; to stand as the measure whereby to mark the narrow bounds of restraint upon speech and press which will be tolerated as reasonable and hence constitutional in the light of the prohibitions of the First Amendment, U.S. Const. Amend. I.

[15] When invoked as here—not to test the constitutionality of the statute itself, Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137—but to test whether the statute is constitutionally applied to a given case, the "clear and present danger" rule furnishes the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused. See Schenck v. United States, 1919, 249 U.S. 47, 51-52, 39 S.Ct. 247, 63 L.Ed. 470; Frohwerk v. United States, 1919, 249 U.S. 204, 209, 39 S.Ct. 249, 63 L.Ed. 561; Debs

v. United States, 1919, 249 U.S. 211; 39 S.Ct. 252, 63 L.Ed. 566; Abrams v. United States, 1919, 250 U.S. 616, 619, 621, 626-628, 40 S.Ct. 17, 63 LEd. 1173; Whitney v. California, 1927, 274 U.S. 357, 366-367, 373, 374, 379, 47 S.Ct. 641, 71 L.Ed. 1095; Hartzel v. United States, 1944, 322 U.S. 680, 686-687, 690-694, 64 S.Ct. 1233, 88 L.Ed. 1534.

[16] In the words of the learned justice who coined the "clear and present" danger phrase: "I do not doubt for a moment that * * * the United States constitutionally may punish speech that * * * is intended to produce a clear and imminent danger * * *." Abrams v. United States, supra, 250 U.S. at page 627, 40 S.Ct. 17, 21.

The indictment charges and the jury by their verdict found that the defendants at bar spoke and otherwise acted "with the intent of causing the * * * overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit." See Dennis v. United States, supra, 341 U.S. at pages 508-511, 71 S.Ct. 857.

[17] Moreover, attention should not stray from the fact that the defendants here are charged with a conspiracy—a conspiracy to violate the Smith Act. Dennis v. United States, supra, 341 U.S. at pages 561, 572-574, 71 S.Ct. 857; Frohwerk v. United States, supra, 249 U.S. at pages 209-210, 39 S.Ct. 249, 63 L.Ed. 561; Goldman v. United States, 1918, 245 U.S. 474, 477, 38 S.Ct. 166, 62 L.Ed. 410. True, the conspiracy is to violate a statute which places some restraint upon freedom of expression. But as I read Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, the Supreme Court holds that the

statute, as there construed, fixes constitutional limitations upon the unqualified declarations of the First Amendment —having first found that the "clear" danger envisioned in the Smith Act lies in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of Government by means of force and violence, Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, and that "present" danger envisioned in the Smith Act consists in the specific intent of teacher or advocate to accomplish the objective of forcible overthrow as speedily as possible. Dennis v. U.S., 341 U.S. at pages 508-511, 71 S.Ct. 857.

[18] Accordingly, since the facts which reason permits to be found from the evidence in the case at bar, combined with the inferences which reasonably may be drawn therefrom, establish substantial proof of the essential elements of the offense charged, the evidence must be held sufficient to sustain a conviction within the meaning of Rule 29(a) of the Federal Rules of Criminal Procedure.

[19] As Mr. Justice Pitney put it in Pierce v. United States, supra, 252 U.S. at pages 251-252, 40 S.Ct. 205, 210, 64 L.Ed. 542: "There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal * * *. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide." See also Abrams v. United States, supra, 250 U.S. at page 619, 40 S.Ct. 17.

[20] The defendants also urge that there is a fatal variance in the proof. Specifically the contention is that

the only possible conspiracy shown by the evidence is one to violate the Smith Act by being or becoming a member of a proscribed "society, group, or assembly of persons • • • knowing the purposes thereof"; whereas the conspiracy charged is to violate the Smith Act by "advocating and teaching • • • [and by] helping to organize • • •."

It is true, as defendants say, that the evidence does establish proof of a conspiracy to violate those provisions of the Smith Act which forbid membership in a proscribed "society, group, or assembly of persons • • • knowing the purposes thereof," but the same evidence which establishes that proof also serves as proof of the charge set out in the indictment. For as stated before, the evidence as to a defendant's connection with, and position and activity and conduct in, the Communist Party is such as to permit the jury reasonably to draw the inference of membership in a conspiracy to advocate and teach and help to organize with the specific intent charged in the indictment.

[21] "Conviction upon a charge not made would be sheer denial of due process." De Jonge v. Oregon, 1937, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278. But conviction upon a charge made by means of evidence which would also support conviction upon a charge not made cannot possibly prejudice the accused.

[22, 23] Rule 52(a) of the Federal Rules of Criminal Procedure directs that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." In the language of Berger v. United States, 1935, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314: "The true inquiry, therefore, is not whether there

has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." Cf. Bennett v. United States, 1913, 227 U.S. 333, 338-339, 33 S.Ct. 288, 57 L.Ed. 531.

In my opinion these "obvious requirements" are fully met in the case at bar even though the evidence which sustains a verdict on the charge here made might also serve as more direct proof of a charge not made.

[24-145] Among the claimed grounds for a new trial, the defendants assert errors of commission and omission in the instructions to the jury. In preparing the instructions, I have drawn freely upon the charge given by Judge Chesnut in United States v. Frankfeld, D.Md.1952, 103 F.Supp. 48, affirmed, 4 Cir.1952, 198 F.2d 679, as well as the instructions of Judge Medina in United States v. Foster, S.D.N.Y.1949, 9 F.R.D., 367-394; affirmed sub nom. United States v. Dennis, 2 Cir.1950, 183 F.2d 201; affirmed 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, and have resolved doubts as to the law in favor of the accused. [The instructions to the jury are included as an appendix hereto.]

[146] Another ground advanced in support of the motion for a new trial is the contention that publication in local newspapers and over local radio and television

of news of an alleged "long-secret F.B.I. report" on the claimed objective of the Communist Party to overthrow the Government by force and violence deprived the defendants of a fair trial.

This report, the defendants assert, was designedly released by Director Hoover of the Federal Bureau of Investigation for publication "on the very eve of the case going to the jury," with the obvious intent of attempting "to get into the jury room * * * through hysterical headlines * * *."

At the time the matter was called to the attention of the court on the morning following publication, the defense had completed presentation of arguments to the jury, and the prosecution was in the midst of the closing argument. The court then offered to permit the defense to reopen argument to the jury, and later offered to make inquiry of the jury as to whether any of them had heard or read of the matter and, if so, whether any juror felt influenced by such extraneous publicity or felt unable for any reason to continue to sit with absolute impartiality and decide the case solely upon the evidence adduced in the courtroom.

At that time, before the case was submitted to the jury, and after pointing to the fact that four alternate jurors had sat throughout the six months of trial, the court advanced the suggestion that, in the event one or more of the jurors might have felt the influence of any such publicity, alternates could be called upon to serve. Spivey v. United States, 5 Cir., 1940, 109 F.2d 181, 186, certiorari denied, 1940, 310 U.S. 631, 60 S.Ct. 1079, 84 L.Ed.

1401; cf. United States v. Gale, 1883, 109 U.S. 65, 69, 3 S.Ct. 1, 27 L.Ed. 857.

The defendants preferred not to have the inquiry made as proposed, but requested the court to poll the jury with the single query whether any had heard or read of the report, it being the position of the defense that any further inquiry would be immaterial. See Reining v. United States, 5 Cir., 1948, 167 F.2d 362, 365, certiorari denied, 1948, 335 U.S. 830, 69 S.Ct. 49, 93 L.Ed. 383; cf. Bowers v. United States, 9 Cir., 1917, 244 F. 641, 649. The court declined to limit the inquiry as the defendants requested, and no mention of the matter was made in submitting the case to the jury other than to caution the jurors repeatedly that their verdict must be based solely upon the evidence in the case as adduced in the courtroom. See United States v. Griffin, 3 Cir., 1949, 176 F.2d 727, 731, certiorari denied, 1950, 338 U.S. 952, 70 S.Ct. 478, 94 L.Ed. 588.

Now, after a verdict of guilty, the defendants wish to support their motion for a new trial by themselves conducting among the jurors substantially the inquiry which the court offered to conduct before the case was submitted to the jury. To permit the inquiry following the conviction would avail the defendants nothing in the circumstances at bar, cf. United States v. McGrady, 7 Cir., 1951, 191 F.2d 829, 831; Bowers v. United States, supra, 244 F. at page 649, for as was said in United States v. Griffin, supra, 176 F.2d at page 731: "There is no proof that the jury or any member of it saw or heard the stories mentioned, but assuming that this did occur, there

is not the slightest reason for inferring that real harm resulted • • •."

[147] Moreover, subjecting the jurors to such an inquiry after verdict would be to violate without warrant the secrecy of the jury room. As Judge Prettyman, when sitting in the Fourth Circuit, so well said in Rakes v. United States, supra, 169 F.2d at pages 745-746: "The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

In Clark v. United States, supra, 289 U.S. at pages 12-13, 53 S.Ct. at page 468, Mr. Justice Cardozo observed: "The books suggest a doctrine that the argu-

ments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid."

Additionally, it should be noted that the Committee on Professional Ethics and Grievances of the American Bar Association has held, in Opinion 109 issued March 10, 1934, that "A lawyer ethically has no right, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions, * * *." [See American Bar Association Opinions of the Committee on Professional Ethics and Grievances, 212 (1936).]

It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial. Cf. Reining v. United States, supra, 167 F.2d at page 365. However, the comments of Mr. Justice Holmes in Holt v. United States, 1910, 218 U.S. 245, 250-251, 31 S.Ct. 2, 5, 54 L.Ed. 1021, seem singularly appropriate here: "* * * one of the grounds for demanding a new trial * * * involve[s] the question how far the jury lawfully may be trusted to do their duty when the judge is satisfied that they are

worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with anyone, and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case, while the trial was going on. * * * The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. * * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

These observations of the scholarly Justice, written for a unanimous court in 1910 before the advent of radio or television would seem *a multo fortiorari* sound today. United States v. Weber, 2 Cir., 1952, 197 F.2d 237, 239; United States v. Leviton, 2 Cir., 1951, 193 F.2d 848, 857, certiorari denied, with opinion by Mr. Justice Frankfurter, 1952, 343 U.S. 946, 72 S.Ct. 860; United States v. Keegan, 2 Cir., 1944, 141 F.2d 248, 258, reversed on other grounds, 1945, 325 U.S. 478, 65 S.Ct. 1203, 89 L.Ed. 1745.

[148] There has been no showing that the jury at bar did not function as a jury should function, free from all extraneous influence, in the best tradition of this outstandingly characteristic institution of the Anglo-American legal system. And the presumption is that the jurors faithfully performed their official duties. Baker v. Hudspeth, supra, 129 F.2d at page 782; Cavness v. United

States, 9 Cir., 1951, 187 F.2d 719, 723, certiorari denied, 1951, 341 U.S. 951, 71 S.Ct. 1019, 95 L.Ed. 1374.

Finding no errors in the conduct of the trial which can fairly be said to affect any substantial rights of the defendants, proper exercise of discretion requires that the motion for a new trial be denied.

[149] The motion in arrest of judgment does not warrant discussion in addition to what was said in United States v. Schneiderman, supra, 102 F.Supp. 87. Since the indictment does clearly "charge an offense", Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, and this court concededly has jurisdiction of the offense charged, there is no reason to arrest judgment.

The defendants were lawfully and fairly indicted, tried and convicted. There appears no basis in fact or law to acquit, arrest the judgment, or order another trial.

[150, 151] The presumption of innocence, with which our common-law system of justice favors every defendant throughout the trial, ceased when the jury returned their unanimous verdict of "Guilty." That verdict being fully supported by the evidence, the law now presumes the facts to be as the jury found them.

The motion in arrest of judgment is denied. The motion of each defendant for a judgment of acquittal and the alternative motion for a new trial are also denied.

Appendix C

Copied verbatim below is Appendix A to Appellee's brief in the court below, omitting, however, the sections relating to those appellants who are not parties to this petition. Where the Appendix refers to sections of the brief itself, those sections are added as footnotes. In a few instances it has been necessary for petitioners to set forth some facts which have been omitted, to make a comment with respect to a conclusion and to correct one error. In each instance the added language is italicized and in brackets.

"Most of the activities of appellants have been set forth in the Statement of Facts. However, to afford the Court a convenient reference, the activities of appellants in the Communist Party have been collated below.

"One of the principles of Party organization which Lenin stressed is the principle that the Party must include 'a close circle of regular cadres of leading Party workers, chiefly professional revolutionaries' [Ex. 28, p. 33; see [A. 15 and supra, p. 165]. The facts bearing an appellants' character as 'professional revolutionaries' may be summarized as follows:

"*Oleta O'Connor Yates.*

"In 1933 appellant Yates joined the Communist Party [R. 10250] and was a member of the Communist Party in 1935 [R. 455] and continued to be a member of the Party and a functionary or officer of the Communist Party or of the C.P.A. up until the time of trial. In 1936 Yates was organizer of the San Francisco County

Communist Party and a member of the District Committee of District 13, Communist Party U.S.A. She was Educational Director for the Communist Party of San Francisco County and was a delegate to the 1936 National Convention of the CPUSA. In 1937 Yates assisted in conducting a California State Educational and Training School for the Communist Party in San Francisco [A. 6, 8; R. 455, 458; Exs. 522, 523, 524, 525, 584, 631, 632, 633, 634]. In 1936 and 1937 Yates, when a member of the state organizational committee, lectured at California State Communist Party Leadership Schools and used Exhibit 61, "*The Communist Party, a Manual on Organization,*" by J. Peters, in her lectures [A. 8, 9, 248-249; R. 523].

"In the later part of 1937 Yates was present as a member of the District Committee for District 13, Communist Party U.S.A. when appellant Schneiderman read a letter from the National Committee of the Communist Party concerning the setting up of the *People's World* (see *supra,* pp. 86-87),* and was present at meetings of the District Committee when the editorial policy of the *People's World* was discussed (A. 3-6).

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*"In December, 1937, Richmond was selected by the Central Committee of the Communist Party, United States of America, to become managing editor of the new *People's World* (Ex. 636; A. 10), and, in the latter part of 1937, attended a meeting of the District 13 Committee with appellants Schneiderman, Yates and also Harry Kramer, who was the Business Agent of the *Western Worker* and a member of the Communist Party, and heard Schneiderman read a letter from the National Committee, requesting the expediting of 'the setting up of a daily press in California.' At this meeting steps were then taken to form a new paper; subscribers to the *Western Worker* were to automatically become subscribers to the *People's World* (A. 3-4)." (Appellees Br. pp. 86-7.)

"In 1944 Yates was Chairman of the Communist Party and the Communist Political Association of San Francisco [Exs. 565, 563; A. 378] and was a member of the State Committee of the California Communist Political Association [Ex. 415; A. 126-127] and an alternate member of the National Committee of the C.P.A. [Ex. 415; A. 131-132], having attended the National Convention of the Communist Party in 1944 (A. 429).

"According to the witness Van Dorn, Yates had office space in the County or State headquarters of the Party in San Francisco in 1944 until the witness left the building in June, 1948 (A. 363-367) and attended many San Francisco County and California State Board meetings at the Party headquarters in San Francisco at night during this same period [A. 358-361; R. 7771-7780]. In addition, Yates taught a Marxist class at the Communist Party State Headquarters in February, 1945 (A. 369).

"In April, 1945, Yates attended a Party meeting in honor of 'Mother Bloor' in San Francisco at which Mother Bloor said that the day of revolution was near—that 'we were on the threshold of this revolution' and that 'we are prepared to the point that we have arms awaiting for us.' (A. 372). Mother Bloor further stated, 'I am 83 years old and I will live to see this bloody battle through.' 'There will be blood flowing in the streets.' [A. 369-372; R. 7813-7823]."

[*On cross-examination the witness conceded that Mother Bloor at this meeting said, "I am happy to have lived to see the eve of our great victory over fascism. • • • It is wonderful that all the peace-loving nations of the world are gathered in San Francisco to form the United*

*Nations which should be the basis for a lasting peace. * * * The forces of fascism are on the run and you and I will live to see the final victory over the forces of fascism," and that she talked "about the great loss that this country had incurred upon the death of Mr. Roosevelt who had died a few days earlier"—that "she said we had lost our best friend, that he has stood beside us, and that we don't know about Truman, that we are going to give him a trial." (R. 8002-3).]*

[She testified that the reception was held at the home of a Mrs. Batchelor, who she did not know to be a Communist Party member, that she received a printed invitation to the reception which she did not turn over to the Federal Bureau of Investigation although she was reporting to it, that there were less than fifty persons at the reeception and that she knows of only two in attendance who were not Communist Party members but there might have been others, that the two she knew of were ladies who were neighbors of Mrs. Batchelor who invited them there.]

[A number of photographs of the persons present were taken at this reception (R. 8003-4). Mrs. Batchelor, at whose home the meeting was held, testified that she was not a Communist, that her house was rented for the reception, that none of the blood and thunder statements attributed to Mother Bloor by Daisy Van Dorn were made, that the reecption was to such an extent an open one that there was present at it a young man who just happened to be staying with her at the time (R. 12113-17, 12127).]

(The appellant Yates testified that the affair was not a Communist Party affair, that it was purely social, that

Mother Bloor did make a speech but that there was no truth to the version of the speech given by the witness Daisy Van Dorn on direct examination.]

"Yates attended both sessions of the State Convention of the Communist Party in July and August, 1945, in San Francisco [A. 14, 15, 16; R. 616-621] and from September, 1945, to August, 1948, was President or Chairman of the Communist Party of San Francisco [Exs. 567, 568; A. 147; R. 5456].

"In 1946 Yates collaborated with appellant Carlson in preparing Exhibit MF, '*A Handbook for Club Officers*' (A. 387, 388)."

[*This outline describes activities of Communist clubs indicating that the aim and purpose of such activity is to bring understanding of the need for socialism and to win improvements in the conditions of workers. It urges activity in support of such issues as jobs and wages, fair employment practices, peace, election campaigns, etc. The methods by which these activities are to be carried on include "open meetings, state meetings, forums, leaflets and bulletins, use of Party press and literature, circulation of petitions, issues, organization of letter-writing campaigns, organizing mass delegations around issues, organizing actions on grievances" (R. 11057).*]

"(See discussion *supra*, pp. 65-66.)"*

"In May or June, 1946, Yates spoke to a Communist Party meeting in San Francisco attended by appellants

*"The club, as the basic unit of the Party, functions under its club officers. It has a club executive committee which is 'accountable to county or state committee for work of the club during its term in office' (Ex. MF, p. 9). The officers of the club, besides

Schneiderman, Lambert and Lima. In October or November, 1946, Yates attended a Party meeting in San Francisco at which appellant Fox stated that the Party was a revolutionary Party and that he wanted to see the overthrow of 'this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not arrived yet' (A. 148-150). In November or December, 1946, Yates was the main speaker at a Communist Party meeting in Los Angeles attended by appellants Healey, Dobbs, Steinberg, Chernin and Spector (A. 135-136). Yates contributed an article entitled 'The Struggle Against Deviations and Factionalism in San Francisco' for the December, 1946, issue of

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the foregoing, are the club chairmen, educational director, membership and dues director, literature director, press director, and finance secretary (Ex. MF, p. 2)."

"In connection with the educational director's responsibilities for education of the club, there is included the use of reports of the national or state committee meetings. *Political Affairs* and outlines issued by state or county educational committees (Ex. MF, pp. 11-12). Among the duties of the membership and dues directors is that of seeing that new members are told of the 'compulsory attendance at new members' classes' (Ex. MF, p. 13). Further, after the new member has been accepted and enrolled in a new members' class, the membership director must inform the county educational directors of this (Ex. MF, p. 13). Any club member moving to another club must obtain a transfer card from the membership director (Ex. MF, p. 13). No member can be placed on the rolls of any club until transfer has been cleared by the county membership director (Ex. MF, p. 14). The literature director's job is inseparably related to strengthening the Party by the members' reading and studying Marxist-Leninist books and pamphlets (Ex. MF, p. 14). The type of liternature 'should be discussed with the county literature director' (Ex. MF, p. 15). The role of the press director is important since press building is an important part of the Party's fight to win the workers from bourgeois to proletarian idealogy (Ex. MF, p. 15), and a press director is important in 'showing how the editorials in the PW (People's World) are a guide to action from the state and county committees, for every member and branch' (Ex. MF, p. 15)." (Appellee's Brief, pp. 65-6.)

Political Affairs [Ex. 639; A. 157-159, 597] which was the official publication of the CPUSA (A. 408).

"In February, 1947, Yates attended a Communist Party meeting in San Francisco where appellant Schneiderman spoke on 'Left Sectarianism' and 'Right Deviations' and said that the ultimate goal of the Party was the establishment of socialism which could only be brought about through violent revolution (see *supra*, p. 109;* A. 146-147)."

[*The same witness who described this alleged speech testified also at length as to his own Marxist training while a member of the Communist Party. Thus he said he had been taught that a transition, however accomplished, from capitalism to socialism would be "a drastic change", hence a revolution (R. 4913). Further he learned that some part of the process would be violent, because the minority would not permit the majority to effect such a change peacefully (R. 912-13), that when*

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*"The last evidence we have of this left sectarian factionalism in the Party concerned a general county meeting of the Communist Party in February, 1947, at which appellant Schneiderman spoke after he had returned from the annual plenum meeting held in New York December, 1946. This was also attended by appellant Yates. Schneiderman made further remarks in relation to the situation in San Francisco and the expulsion of the left sectarian elements. Schneiderman said that he wanted to assure the Party that 'they were on a purely Marxist-Leninist line, which was the playing of a revolutionary role in society.' He reviewed the San Francisco situation and claimed that many of the persons who were expelled from the Party had formed anti-Party super left groups and that 'again they were like the horse that was too far ahead of the cart, and the party did stand for revolution and he wanted to assure the members of that,' and that 'he doubted if most of the members realized the seriousness of revolution and that revolution meant bloodshed and tragedy and the loss of lives and property, and that these things were expendable in the long run in the fight for socialism' (A 172-173). (See infra, App. A, p. vi.)" (Appellee's Brief, pp. 109-110.)

the majority of the American people would exercise their free choice to establish socialism, the minority would not be willing to accept the wishes of the majority (R. 4902-03). He also heard discussions during 1948 of the perspective of a peaceful change from capitalism to socialism (R. 4876), as embraced in William Z. Foster's The New Europe (Ex. BA), though this was a matter with which he "was not too much concerned" (R. 4877), in which he "wasn't too much interested" (R. 4878).]

"In September, 1947, Yates attended a meeting in San Francisco in which co-conspirator William Z. Foster spoke [R. 4481-4482]."

[*All of the defendants in Dennis are named in the indictment as co-conspirators and they are constantly referred to as such by respondent. However, there was no evidence of any agreement or conspiracy between said Dennis defendants and the petitioners here.*]

"In 1947 Yates assisted in the reregistration of club members in San Francisco (A. 282-284) and in the installation of new club officers on an occasion when she opened a fund drive for the Daily People's World (A. 234-235). In April, 1947, Yates was Chairman of a Party meeting in San Francisco composed of club chairmen 'concentrating on transportation' [R. 5458-5459]. Between December, 1947, and July, 1948, Yates attended approximately two dozen secret meetings of the State Committee of the Communist Party of California at the home of witness Bessie Honig in San Francisco (A. 223-241).

"In 1949, Yates was still Chairman of the Communist Party of San Francisco [Exs. 583, 560] and with the as-

sistance of appellant Schneiderman prepared a 'Study Outline' for the Marxist Institute [Ex. 163; A. 397].

"Exhibit 181, 'The Party Review' Preconvention Discussion Bulletin circulated in the California Party in 1950 announced that the State Committee had set up a special committee composed of Yates, appellant Al Richmond and Hursel Alexander to help develop the preconvention discussion and instructed that articles for the Party Review should be addressed to Yates [Ex. 181; A. 99, 579]. Yates was a member of the California State Committee of the Communist Party in 1950 (A. 418) and attended the California State Convention of the Communist Party in San Francisco in December, 1950, at which the appellant Schneiderman was elected a delegate to the National Convention (A. 403-404). In April, 1951, a letterhead of the Communist Party identified Yates as State Secretary of the Communist Party [Ex. 538] and in June, 1951, she was introduced to a Communist Party meeting as State Organizational Secretary. In 1951, Yates in connection with her duties as an official of the Communist Party met with leaders of the Party at the Communist Party headquarters in Los Angeles, particularly with appellant Carlson (A. 394-395).

"At the trial, Yates testified that she was State Organizational Secretary of the Communist Party of California, having acquired this position toward the end of 1950 and had the duty of helping organize recruiting to build the Communist Party, of organizing mass campaigns and checking upon the payment of dues in various sections of the Party (A. 393-394).

"*Henry Steinberg.*

"In 1936 Steinberg attended meetings of YCL leaders in Los Angeles with appellants Dobbs and Carlson. In June or July, 1940, Steinberg with appellant Connelly attended a county committee meeting at Communist Headquarters in Los Angeles when a discussion of the impending election campaign and of the Communist campaign for Southern California was discussed, also, the Communist slogan 'Don't Support the Imperialist War,' 'Vote Communist,' 'Vote for Browder and Ford' were discussed. At this time Steinberg had come into his own as a practical politician of the Communist Party (A. 247-248).

"In July, 1940, Steinberg was a registered Communist in San Francisco County, California [Ex. 521; A. 454]. In the summer of 1940, Steinberg ran for public office on the Communist ticket [Exs. 516, 557; A. 454]. In November, 1942, Steinberg attended a County committee meeting of the Los Angeles County Communist Party in the Headquarters of the Party in Los Angeles (A. 256-257). In March, 1943, Steinberg was a registered Communist in Los Angeles County, California [Ex. 518; A. 454]. In December, 1946, or January, 1947, Steinberg was Educational Director of the Los Angeles County Communist Party (A. 138-139).

"In January, 1949, Steinberg was Chairman of the Lenin Memorial Meeting sponsored by the Los Angeles Communist Party at which appellant Dobbs was the main speaker [Exs. 737, 159-B; A. 207-211]. In May, 1949, Steinberg attended a Communist Party meeting in San

Diego, California, at which the appellant Schneiderman spoke (A. 29-30). In March, 1950, Steinberg was Legislative Director of the Los Angeles County Communist Party [Ex. 517; A. 455]. In the spring of 1950, Steinberg attended a Daily People's World circulation drive meeting in Los Angeles (A. 95-96). In 1950, Steinberg attended a closed Party meeting in Los Angeles while he was running for the Board of Education, where he talked on the *People's World* drive, and protested the jailing of co-conspirator Dennis (A. 98-99). In May, 1950, Steinberg was advertised as one of the speakers at the May Day, 1950, meeting sponsored by the Educational Committee of the Los Angeles County Communist Party [Ex. 358; R. 2828]. In October, 1951, Steinberg and appellant Healey were advertised as the speakers at a rally sponsored by the Los Angeles County Communist Party [Ex. 359; R. 2844-2847].

"Loretta Starvus Stack, also known as Loretta Starvus and Lottie Kieth.

"In 1932, appellant Stack was known to witness Patterson as Lottie Kieth, Patterson, in the National Offices of the Young Communist League in New York, upon the instructions of co-conspirator Gilbert Green, National Secretary of the Young Communist League, gave a lecture to Stack and others who were going to Russia to attend the International Lenin School. In the fall of 1934 Patterson talked with Stack upon her return from the Lenin School in Moscow in the District Offices of the Young Communist League in Philadelphia, at which time Stack informed Patterson that she had received instruc-

tions in the Lenin School about using automobiles, buses and street cars for barricades to protect the revolutionists in their fighting, and that she had been instructed that it was her duty upon her return to the United States to prepare the Party apparatus for "illegal work, but at the same time, to try to stay legal as long as they could. But in the event that there is an attempt on the part of the American Government to drive the Party underground, that the Party apparatus would be intact, and it would function right along." Stack further told Patterson that the Lenin School had definitely established that the dictatorship of the proletariat could only come about as a result of the overthrow of the Government in the respective countries; and 'that it was the duty of the students of their respective countries to work to overthrow their own Governments and to set up the dictatorship of the proletariat as a guarantee that the Government that was overthrown would not regain its power.' Stack told Patterson that while at the Lenin School, she had received training in the use of bayonets. Stack was a member of the District Committee of the Young Communist League in 1934 in the Philadelphia District [A. 213-220, 222, 223; R. 5354-5387; R. 5760-5761].

"In 1945 Stack was a delegate from the California Communist Party to the National Convention of the Communist Party in New York (A. 72-73). In August, 1945, Stack, then known to witness Wereb as Loretta Starvus, was elected a member of the State Committee of the Communist Party [A. 124-125; Ex. 398; also A. 130], and in accepting her election to the State Board Stack said that the American workers would be the grave-

diggers of the capitalist government and urged that Marxist-Leninist rules be reinstated all over.*

"From the end of 1945 until about June, 1948, Stack had office space at the Communist Party Headquarters in San Francisco (A. 364-365). At least from October, 1945, through March, 1949, Stack was a prominent member of the Communist Party in California and was Secretary or Organizational Secretary of the Communist Party in California [Exs. 533, 562, 564, 566, 569, 570, 577, 582; A. 446-452]. Appellant Yates became Organizational Secretary toward the end of 1950 (A. 393)."

"In August, 1946, Stack spoke at a Communist Party Convention held in Los Angeles, at which she said that the Communist Party was the instrument through which the capitalist government would be overthrown, and a social form of government set up (A. 29, 30). In December, 1946, Stack spoke at a Los Angeles County conference of the Communist Party as a 'comrade' from San Francisco and said that the poor conditions under capitalism should spur the Party into working for socialism 'in our time in the United States' (A. 306). In the spring of 1947, Stack was Organizational Secretary of the California Communist Party (A. 238). Between December, 1947, and May, 1949, Stack attended secret meetings of the State Board of the California Communist Party at the home of witness Bessie Honig (A. 223-231).

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*"See Exhibit 39, the *Communist Manifesto*, page 21: 'What the bourgeoisie therefore produces, above all, are its own grave diggers. Its fall and the victory of the proletariat are equally inevitable.'

"Loretta Starvus (appellant Stack) made a report entitled: 'Major Problems in Party Building' to the 1948 State Convention in which she commented on how the Party was reconstituted from its 'revisionist period to a Leninist concept . . . a Marxist Party that shall function as the vanguard of the working class, coordinating and directing the class struggle of the proletariat.' Stack further urged emphasis upon building the Party among the industrial workers as the only way to achieve the Party's political objectives. Others reporting to the convention were appellants Schneiderman and Richmond and co-conspirator John Williamson [Ex. 186; A. 580-581].

"In October, 1948, Stack as Organizational Secretary of the California Communist Party, spoke to a Party meeting in San Francisco on the 'Woman Question,' and said that the Party should occupy the highest position in a person's life and that Party policy should take precedence over family life. Stack referred to the historic role that women played in bringing about the Russian Revolution and said that the women of today must take the same role in bringing about the revolution." [*The following two sentences are in error. The statements referred to were not made by petitioner Stack, but by some third person outside of petitioner's presence and knowledge at a school with which petitioner was not shown to have had any connection.*] "Stack further said that the change from capitalism to socialism would be 'a dynamic thing, something of a force, that we wouldn't just go right easily into socialism. That the prerequisite, the preconditions for the socialist society would have to

be developed over a period of time, but the change would be a violent thing, something that would happen over night . . .' (A. 117-120).

"In 1948, the name of Loretta Starvus was carried on the letterhead of the Communist Party of California as Organizational Secretary [Ex. 315]. In 1950, Stack was a member of the California State Committee of the Communist Party (A. 418). Appellant Yates testified in June, 1952, that in connection with her duties as an official of the California Communist Party, she had been in touch with Stack many times within the past five years (A. 396).

"*Frank Efriom Spector.*

"'Two Decades of Progress' from 1919 to 1939, issued by the Los Angeles Communist Party in September, 1939, refers to Frank Spector on page 16 as a 'pioneer leader of the Communist Party in Los Angeles' [Ex. 611]. Witness Nat Honig met Spector in 1934, during which period Honig was the representative of the American Communist Party to the Red International Labor Unions in Moscow, U.S.S.R. (A. 332). In 1935 Spector participated in a meeting of the State Committee of the Young Communist League in San Francisco (A. 243-244). Witness Saunders recalls that Spector came to San Francisco from New York about 1936 to become Organizer of the San Francisco County Communist Party, and that he still held this position in 1940 (A. 12). In 1936, Spector attended underground meetings of the County Committee of the Young Communist League in Los Angeles (A. 262-264). Early in 1937, Spector at-

tended a District Committee meeting of District 13 of the Communist Party, at which time, he was San Francisco County Secretary of the Party (A. 5-6).

"In 1940 or 1941, Spector protested to witness Lautner the decision of the Communist Party that non-citizens could not be a member of the Party and declared that he had a right to be a member of the Communist Party; that he was a proletarian and had a right to belong to a working class party and he was going to fight for his right to remain a member of the Party [A. 45-46; R. 2039-2043].

"In the summer of 1945, Spector participated in a Communist Political Association Meeting in Los Angeles (A. 307). In November or December, 1946, Spector attended a Communist Party Meeting in Los Angeles at which appellant Yates was the main speaker and which was attended by appellants Healey, Steinberg, Dobbs and Chernin (A. 135-136). In December, 1946 Spector conducted classes in Hollywood (A. 307-310) and instructed the class to read the chapter on 'The Party' in *Foundations of Leninism* [Ex. 1], a pamphlet entitled 'Mastering Bolshevism' by Stalin, and *'The United Front Against Fascism,'* by Georgi Dimitrov [Ex. 119].

"On September 15, 1947, Spector and others advised witness Russell that he was suspected of being a spy in the Party and questioned him on the extent of his Marxist reading. Spector told Russell that the reading of the *Communist Manifesto* [Ex. 39], *Foundations of Leninism* [Ex. 1], 'Mastering Bolshevism,' Wage, Labor and Capital, by Marx, Value, Price and Profit by Marx, and the *History of the CPSU* [Ex. 28] constituted a remarkably

small amount of reading for the Educational Director of a club, the position which witness Russell held, and said that a person in a position of such responsibility ought to be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members. Thereafter, Spector and his friends searched witness' wallet and his room (A. 310-312). At a session of a Communist Party Section Leadership Training School held in May or June, 1949, a Section Educational Director of the Los Angeles County Communist Party announced that at the next meeting, Frank Spector would be the instructor on the topic of 'The State' (A. 297). In September, 1949, Spector attended a Communist Party meeting in Los Angeles, at which appellants Healey and Dobbs spoke (A. 291-292).

"In the fall of 1950, 'The Party Review,' a pre-convention discussion bulletin published by the California State Organization of the Communist Party [Ex. 181] contained an article by Frank Spector entitled, 'On "Subjective Reactions" and "Political Vacations" Among Left Progressives in the Trade Unions' in which he castigated the Communists and left-progressives who had been driven from the leadership of the unions, for failing to fight back, because now the bosses and their agents were able to 'chain them (the unions) to the imperialists' policies of war abroad and fascism at home' [Ex. 181, p. 3].

"In May, 1950, Spector was introduced to a functionaries' meeting of the Southern Division of the Los Angeles County Communist Party as Organizer of the Southern Division (A. 292-294).

"*Albert Jason Lima, also known as Mickey Lima.*

"Evidence shows that Lima was an active Communist from at least June, 1940 to April, 1943 [Exs. 554, 520, 553, 528, 527, 537, 539; A. 452-458]. In 1945 he was a Field Organizer for the Communist Party working out of the San Francisco office of the Party and attended the 1945 State Conventions of the Communist Party (A. 12). Lima had office space at the State Headquarters of the Communist Party in San Francisco from the end of 1945 to at least June, 1948 (A. 362-364). *Struggle Against Revisionism* published by the Communist Party of the United States in January, 1946, reflects that Lima was a member of the National Committee of the Communist Party along with appellant William Schneiderman and co-conspirators William Z. Foster, Eugene Dennis, John Williamson, Robert Thompson, Benjamin J. Davis, Jr., Jack Stachel and Irving Potash [Ex. 650; A. 598].

"The '*May Day Rally*' program for May 7, 1947, in Los Angeles, California, reflects that Lima, a member of the National Committee of the Communist Party United States of America and Assistant State Organizational Secretary, was advertised as the main speaker [Ex. EA].

"In May or June, 1946, Lima attended a Communist Party meeting in San Francisco, also attended by appellents Schneiderman, Yates and Lambert (A. 150-153).

"In February, 1947, Lima attended a Communist Party meeting in San Francisco at which appellants Schneiderman, Yates and Lambert were present and at which appellant Schneiderman spoke on 'left sectarianism' and 'right deviations' and assured those present that the

Communist Party was a revolutionary Party, but that the time had not yet come for revolution and that the Communist Party's ultimate goal was the establishment of socialism which could only be established by violent revolution (R. 145-147)." [*For further details regarding this alleged incident see the section dealing with petitioner Yates,* p. 152, *supra*]. "In July, 1947, and in December, 1947, Lima held the title of Secretary of the Communist Party of California [Exs. 561, 569; A. 447].

"A letterhead of the Communist Party of California, State Office, circulated in 1948 reflects that Lima had the title of 'Field Organizer' [Ex. 315; R. 6717, 6723, 6728, 6729].

"Between December, 1947 and May, 1949, Lima attended approximately two dozen secret meetings of the State Board of the Communist Party of California at the home of Bessie Honig in San Francisco (A. 223-231).

"In December, 1950, Lima, as Chairman of the East Bay Region (consisting of Contra Costa and Alameda Counties, California) attended the West Oakland Convention of the Communist Party held in Berkeley, California (A. 109-111); also, in December, 1950, following the West Oakland Convention, a Party meeting was held in Berkeley, California, for the purpose of electing delegates to the California State Convention of the Communist Party, at which meeting 'Lima was elected a delegate to such State Convention' [A. 114; R. 3574-3575]. In January, 1951, Lima, as Chairman of the East Bay Region of the California Communist Party was in charge of proceedings at an East Bay Regional Convention held in two sessions in Oakland and El Cerrito, California,

and which was attended by appellants Schneiderman and Richmond.

"Carl Rude Lambert.

"In 1935 Lambert was responsible for the security of the Party in California (A. 249-250). In 1936 Lambert was observed at Communist Party Headquarters in California and was then on the Party Control Commission (A. 12). In 1936 Lambert attended underground meetings of the Los Angeles County Committee of the Young Communist League in Los Angeles (A. 262-264).

"The evidence reflects that Lambert occupied an important position in the Communist Party District 13 or in the Communist Party of California either as an officer or member from 1939 to 1949 [Exs. 574, 572, 582, 564, 571, 556, 563; A. 446-449]. When Lambert was Treasurer and Assistant Treasurer of the Communist Party (see foregoing exhibits), he maintained an office at the Communist Party State Headquarters in San Francisco during 1944 and the early part of 1945 (A. 364). During 1945 Lambert attended meetings of the State Board of the Communist Party and of the County Board of the San Francisco County Communist Party in the Headquarters of the Communist Party in San Francisco during 1945 (A. 359). In April, 1945, Lambert attended a Party meeting in honor of 'Mother Bloor' in San Francisco at which Mother Bloor said that the day of revolution was near—that 'we were on the threshold of this revolution' and that 'we are prepared to the point that we have arms waiting for us.' Mother Bloor further stated, 'I am 83 years old and I will live to see this

bloody battle through. There will be blood flowing in the streets' [A. 369-372; R. 7813-7823]." [*For further details regarding this alleged incident see the section dealing with petitioner Yates*, p. 148 et seq., *supra*.] "In June, 1945, Lambert was at the Headquarters of the Communist Political Association in San Francisco and attended the convention held in San Francisco in June, 1945 (A. 13). In May or June, 1946, Lambert participated in a Party meeting in San Francisco and spoke as head of the Security Committee of the Party against persons accused of anti-party activity (A. 150-153). In the latter half of 1946 Lambert was introduced to witness Bessie Honig at the State Headquarters of the Party in San Francisco as head of Party Security (A. 235).

"In October or November, 1946, Lambert attended a Party Meeting concerned with the expulsion of two members for 'left sectarianism' at which appellant Fox declared that the Party was a revolutionary party and that he wanted to see the overthrow of 'this lousy system just as much as anybody else present, but there was a time and place for militant action and that it had not arrived yet' (A. 148-150).

"In February, 1947, Lambert attended a Party meeting in San Francisco where appellant Schneiderman spoke on 'left sectarianism' and 'right deviations' and assured the members that the Communist Party was a revolutionary party, but that the time had not yet come for action. Scheiderman pointed out that revolution meant tragedy, violence and bloodshed and that the ultimate goal of the Party was the establishment of socialism which could only be established through a violent revolu-

tion (see Schneiderman, *supra;* A. 145-147)." [*For further details regarding this alleged incident see the section dealing with petitioner Yates,* p. 152, *supra.*]

"In the Spring of 1947, Lambert addressed a joint Party club meeting in San Francisco as head of Party security and advised the members how to protect themselves from the F.B.I. and related the histories of some people (including his brother, Walter) expelled from the Party (A. 235-236). In December, 1947, or July, 1948, Lambert attended about two dozen secret meetings of the State Board of the Communist Party of California in San Francisco (A. 223-231). Early in 1948, Lambert attended a functionaries' meeting of the Los Angeles County Communist Party at which the appellant Dobbs compared the Daily People's World (see *supra*) as having a similar role in the United States as 'Pravda' had in the revolutionary movement in Russia [A. 186-189; R. 4979-4989].

"In June, 1948, Lambert attended a Party meeting in San Diego as Chairman of the Security Commission of the California Communist Party (A. 27, 28). On June 17, 1949, Lambert attended a meeting of the Chico Club of the California Communist Party and said that he was there as Chairman of the State Security Board of the Communist Party to settle a dispute between two members concerning union activities (A. 327). On July 20, 1950, Lambert again attended a meeting of the Chico Club of the California Communist Party and said that he was there concerning charges that had been filed against witness Sutherland, and that the State Board had recommended that Sutherland be expelled. Lambert

further said that they were 'purging the Party' for emergency or revolution, and said that the European crisis or the Korean crisis might determine how soon the revolution would come. Lambert was asked by witness Sutherland, 'Are you really planning revolution by bullets instead of ballots?' Hursel Alexander, in Lambert's presence, answered 'just what the hell do you think we are purging the Party for?' (A. 328-329; R. 7617-7620)."

[*On cross-examination the witness Sutherland admitted that several charges had been leveled against him by the Communist Party but that they were finally "trimmed" down to the charge of chauvinism. He stated that it was a common practice in the Communist Party to expel from the Party any white members who exhibited any feeling of superiority over Negroes. He admitted that he was specifically charged with attempting to cheat a Negro out of a piece of real estate for the sum of $250; however, he stated that the amount of money involved was incorrect. He further admitted that there was a charge against him concerning his carrying a gun at a time when he was distributing leaflets in behalf of the Communist Party. He denied that he was actually carrying a gun but admitted that he was severely criticized by the Party because it was believed that he was carrying a gun (R. 7664-68).*]

"*Rose Chernin Kusnitz, commonly referred to as Rose Chernin.*

"In April, 1943, Rose Chernin was Section Organizer of the Bronx Section of the Communist Party, Bronx,

New York, and addressed a meeting in that month in which she urged increasing the Communist Party membership and the necessity for women becoming more active in the Party due to the men joining the Armed Forces (A. 317).

"In the summer of 1945, Mrs. Kusnitz attended the New York State Convention of the Cominunist Party in New York (A. 45).

"In November, 1946, Mrs. Kusnitz attended a Communist Party meeting in Los Angeles on an occasion when the appellant Schneiderman urged the demobilization of all United States Armed Forces, the removal of all labels from American relief goods sent anywhere in the world and urged that Marxist training be immediately started in the Party and stated that free elections in this country could only serve the purpose of the Fascists (A. 133-135).

"In November or December, 1946, Chernin attended a Communist Party meeting in Los Angeles at which appellant Yates spoke on the influence of the Soviet Union in various countries and said it was only through the support of the Soviet Union that it would be possible for Marxism to succeed (A. 135-136).

"As Organizational Secretary, 66th Assembly District Section, Los Angeles County Communist Party, Chernin contributed an article in Exhibit 182 'Pre-convention Discussion Bulletin No. 2' issued by the California State Committee of the Communist Party, June 25, 1948, entitled 'Party Building and the Fight for Negro Rights' in which Chernin stated that they had held training semi-

nars in her section to solve the leadership problems in the section and referred to the improvement achieved in the sale of the *People's World* and in the obtaining of subscriptions to the *People's World*. Chernin also referred to the fact that the section had undertaken a quota of 75 recruits in the Party Building Drive [Ex. 182; A. 581-582].

"In August or September, 1949, Mrs. Kusnitz left her position as a Section Organizer of the West Jefferson Section, Los Angeles County Communist Party, and became the Organizational Secretary of the Midtown Division,* Los Angeles County Communist Party (A. 356). In June, 1950, Mrs. Kusnitz was Chairman of a Midtown Division Meeting of the Los Angeles County Communist Party held in connection with the Daily People's World Fund Drive and as Chairman received funds collected in the drive from representatives of various clubs of the division (A. 356-357).

"*Ernest Otto Fox.*

"In 1935, Fox was Organizer for the Communist Party in Seattle, Washington (A. 10). In 1936, Fox attended a Communist Party caucus of trade unionists in San Francisco (A. 249). Between 1944 and 1948 (A. 368), the witness Van Dorn observed Fox going up to the State Headquarters of the Communist Party in San Francisco for State Board meetings at night 'eighty to one hundred times' (A. 366-368). About October, 1946, Fox

*"Apparently, three different schools of the year-long Marxist Institute were held in the Mid-town Division while appellant Kusnitz was its Organizational Secretary, in view of the Directive that such schools be set up in the Division [Ex. 204].

participated in a Party meeting in San Francisco concerned with the expulsion of two members for 'Left Sectarianism' and denied that the party was still influenced by the Browder policies and declared that the party was a revolutionary party but that the party 'was not going to stick its neck out' and get its 'head chopped off.' Fox stated that he 'wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action, and it had not arrived yet' (A. 148-150).

"In 1946 Fox attended an executive session of the Warehouse Club of the Communist Party in San Francisco and became a member of this club in January or February, 1947, and in the latter part of 1947 and the first half of 1948, Fox became Chairman of the Warehouse Branch of the Party, which was then called the Joe Galdo Club [R. 4394-4395; A. 283]. Early in 1948, when Fox was being considered for Chairman by the Joe Galdo Club, it was decided that such a position might jeopardize his citizenship; subsequently it was announced at a club meeting that the County Organization in San Francisco did not approve of the club's action in regard to Fox and that the County directed that Fox be chairman of the Club (A. 285). In 1948 secret meetings of the State Board of the Communist Party were held at the home of witness Bessie Honig in San Francisco (A. 225) which were attended by Fox (A. 230-231). In the summer of 1948 Fox attended a party meeting in San Francisco and urged better organization of the Haskell Section of the party (A. 284): In 1948 Fox maintained a complete set of the Little Lenin Library in his home (A. 289).

"In the summer of 1948 Fox told the witness Addy that he had attended a secret National Party School in New York and had been a delegate to a party convention in New York without specifying the dates of these events [A. 286; R. 6598-6603]. In 1949 Fox became the Organizer of the Waterfront Section of the Communist Party in San Francisco (A. 288), having been Chairman of the Haskell Section of the Party until that time (A. 283).

"Exhibit 177, 'Our Party, Preconvention Bulletin No. 4,' issued by the Communist Party, U.S.A., was circulated throughout the Party about September 1951 [R. 2831], reflects that Fox was Maritime Section Organizer for the Party in San Francisco and contributed an article in this exhibit entitled: 'Weaknesses in our Maritime Work' [Ex. 177; A. 579]. A preconvention Discussion Bulletin was issued and circulated throughout the party by the California State Organization in the Fall of 1950 which reflects that Fox was Maritime Section Organizer in San Francisco and contributed an article in this exhibit entitled: 'The Right Opportunist Obstacles to Work in the Maritime Industry' [Ex. 181; A. 579; R. 2832].

"*Ben Dobbs.*

"Appellant Dobbs was a member of the YCL from 1932 [R. 6136-6137] to 1945 (A. 11). In 1933 Dobbs attended discussion group meetings of the YCL (A. 243). In 1935 Dobbs was in San Francisco and was then Director of the YCL. In the early part of 1935, Dobbs led discussions among leaders of the YCL in the offices of the YCL in Los Angeles and used Exhibit 485 'Young Communists in Action,' which explained the relationship

of the YCL to the Communist Party, that the YCL was part of the Communist Party as a whole, that the YCL acknowledged the political leadership of the Communist Party and that the YCL was a school for Communism [Ex. 485; A. 594, 258]. In 1935 Dobbs attended a meeting of the State Committee of the YCL in San Francisco (A. 243, 244). In 1936 Dobbs attended underground meetings of the YCL in Los Angeles (A. 262, 264). In September, 1936, Dobbs as Benjamin Isgur, was appointed a member of the State Central Committee of the Communist Party [Ex. 549; A. 458]. In the latter part of 1936, Dobbs attended a meeting of YCL leaders in Los Angeles which was also attended by appellants Carlson and Steinberg (A. 247). In the year 1936, Dobbs was also active as a representative of the YCL in San Francisco and attended executive committee meetings of the waterfront section of the Communist Party in San Francisco [R. 1232-1233]. In the early part of 1937, Dobbs attended a meeting of the State Committee of the YCL at Communist headquarters in San Francisco. In June, 1938, Dobbs, as Benjamin Isgur, was a registered communist [Ex. 634; A. 456]. In September, 1938, Dobbs attended a State meeting of the YCL at Communist Party headquarters in San Francisco (A. 250).

"Exhibit 611, 'Two Decades of Progress' 1919-1939, published by the Communist Party of Los Angeles County, reflects on page 26 a salute of the YCL to the Communist Party and contains the photograph of Ben Dobbs, Executive Secretary of the YCL [Ex. 611; R. 5591-5593]. Before 1948, Dobbs attended at least fifty meetings at the California State Headquarters of the Party in San Francisco (A. 368).

"In the Fall of 1946, Dobbs attended a Communist Party meeting in Los Angeles, which was addressed by the appellant Schneiderman (A. 133-134). In November or December, 1946, Dobbs attended a Communist Party meeting in Los Angeles, which was addressed by appellant Oleta Yates (A. 135-136). In December, 1946, Dobbs was introduced to the witness Wereb as Labor Chairman of the Los Angeles County Communist Party at Communist Party Headquarters in Los Angeles. This witness subsequently heard Dobbs speak at Party fund raising rallies (A. 137). In December, 1946, Dobbs attended a conference of the Los Angeles County Communist Party in Los Angeles (A. 306-307). In May, 1947, Dobbs was County Labor Director of the Los Angeles County Communist Party and was Chairman of the Communist-sponsored May Day Rally, May 7, 1947 [Ex. 407; R. 3937-3939].

"In March, 1948, Dobbs lectured to a Communist Party Press School in Los Angeles and required the class to read pages 149 through 159 in the History of the Communist Party of the Soviet Union [Ex. 28], and compared the role of the Daily People's World in the United States with that of the Russian newspaper 'Pravda' in the revolution in Russia. Dobbs said that the *People's World* had a similar role in the United States and that it was necessary for the press directors responsible for the distribution of the People's World and of other literature to see that an organization was set up to provide for the distribution of Communist publications by underground methods when Communist publications were no longer allowed in the United States as had been done by Pravda in Russia [A. 193-196; R. 5014-5018]."

[*Approximately fifty issues of the People's World were introduced into evidence and many hundreds of others were available for such introduction. There was not one article in one issue that advocated directly or by inference the overthrow of the government by force and violence.*]

"In March, 1948, Dobbs attended a south side section functionary meeting of the Los Angeles County Communist Party where he was introduced as the Trade Union Director of the Los Angeles County Communist Party (A. 289-290). In March, 1948, Dobbs addressed a functionary meeting of the Los Angeles County Communist Party, also attended by appellants Healey and Carlson, in which he again referred to the History of the Communist Party of the Soviet Union and again compared the role of 'Pravda' with the role of the *People's World* in the United States and said that in addition the *People's World* must be maintained for the purpose of issuing instructions to party workers. (A. 186-192). In April, 1948, Dobbs was a registered Communist in Los Angeles County, California [Ex. 559; A. 452]. As Labor Secretary of the Los Angeles County Communist Party Dobbs made one of the major reports to the County Convention of the Los Angeles County Communist Party held July 10 and 11, 1948, and urged that the entire Party must develop its concentration work to change the composition of the Party and increase its working class base [Ex. FO, p. 3; R. 5152-5156].

"January 21, 1949, Dobbs as Labor Secretary of the Los Angeles County Communist Party made the main speech at a Lenin Memorial Meeting in Los Angeles, sponsored by the Los Angeles County Communist Party;

appellant Steinberg was Chairman of the meeting [Exs. 737, 159-B; A. 208-211].

"In September, 1949, Dobbs was Chairman of a Party meeting sponsored by the Los Angeles County Communist Party at which the appellant Healey, as Chairman of the Los Angeles County Communist Party spoke (A. 291-292).

"In December, 1949, Dobbs as Organizational Secretary of the Los Angeles County Communist Party spoke at the 32nd Anniversary Celebration of the Establishment of the Soviet Union, which event was sponsored by the Los Angeles County Communist Party (A. 108-109).

"In March, 1950, itness Scarletto was directed to the home of Ben Dobbs to ascertain the new location of the next class of the Marxist Institute. Dobbs was present when the witness was instructed to wait for a person who would take him to the new class (A. 96-97). In May, 1950, Dobbs as Los Angeles County Organizational Secretary of the Communist Party was a speaker at a functionary meeting of the Southern Division of the Los Angeles County Communist Party at which appellant Spector was introduced as Organizer of the Southern Division. Dobbs spoke on the Daily People's World fund and subscription drive (A. 292-294). In the summer of 1950, Dobbs spoke concerning the Daily People's World drive at an all day meeting of the Los Angeles County Communist Party (A. 98). In the Fall of 1950, witness Lancaster was informed that because he worked in a key industry he was being dropped from his club and further open activities in the Communist Party and that such ruling was also being applied to Ben Dobbs (A. 299-300).

The account of the Los Angeles County Communist Party in the Bank of America, Los Angeles Branch, reflects that Dobbs was an officer of the Los Angeles County Communist Party in April, 1951 [Ex. 642; A. 451].

"*Dorothy Healey Connelly.*

"In 1933 Dorothy Healey Connelly, commonly called 'Dorothy Healey,' was in the Los Angeles Office of the Young Communist League (A. 243) and in 1936 she attended underground meetings of the County Committee of the YCL in Los Angeles (A. 262-264). Early in 1945 Healey was the highest functioning party official available to settle a dispute in a Party Club (A. 124).

"Healey participated in major phases of the California State and Los Angeles County conventions of the Communist Political Association or of the Communist Party in June, July and August, 1945, when the Duclos article and the reconstitution of the Party were discussed. She also participated in the actual reconstitution of the Communist Party having attended the National Convention of the Communist Political Association in New York where the reconstitution of the Communist Party was accomplished. After this national convention Healey spoke at the second session of the California State Convention, Southern Section, and said that the future of the Party would be militant. She urged the re-education of all Marxists and the recruiting of new members in basic industries. Healey, in June, 1945, was observed at the State Headquarters of the Communist Party in San Francisco, where she visited many times between June and

December, 1945, and at least 20 times after December, 1945. At the June, 1945, session of the California Communist Political Association Convention, Healey was named on a subcommittee to examine the question of State leadership and submit its findings to the second session of the convention. At these convention sessions Healey was elected a member of the California State Committee of the Communist Party and about the same time she was elected Organizational Secretary of the Los Angeles County Communist Party [A. 44, 130-131, 124, 374-375, 124-125; Ex. 415].

"Healey, in August, 1946, addressed a Party meeting and urged that Trade Union leaders be Marxist trained and that all strikes in basic industries must be communist led and the Party leadership must be consulted on the progress of strikes (A. 133). In October, 1946, Healey's name appeared on the letterhead of the Communist Party as Organizational Secretary of the Los Angeles County Communist Party [Ex. 321]. In 1946 Healey was elected a member of the California State Committee of the Communist Party [A. 125; Ex. 398]. In February, 1947, Healey attended a Party meeting in Los Angeles and urged the necessity of recruiting new members among industrial workers in the basic industries (A. 305-306). In May, 1947, Healey addressed a Communist Party sponsored May Day Rally in Los Angeles as County Organizational Secretary of the Communist Party [Ex. 407]. In 1947 Healey spoke at a meeting attended by co-conspirator Henry Winston, Organizational Secretary of the National Committee, Communist Party of the United States of America (A. 31). In 1948, Healey attended

secret State Board meetings of the California State Communist Party at the home of witness Bessie Honig (A. 231). In March, 1948, Healey addressed a Los Angeles County Communist functionaries meeting and again urged recruiting new members in labor unions, particularly those in a position of leadership [A. 186-191; R. 4979-4989]. In the spring of 1948, at a Party meeting in Los Angeles called for the purpose of dividing a section, Healey was introduced as Los Angeles County Organizational Secretary of the Communist Party (A. 289-290). In the summer of 1948, she was, likewise, introduced at a meeting held in Los Angeles for the purpose of electing delegates to the State Conventions, Healey being one of the delegates elected (A. 291). Healey as Los Angeles County Organizational Secretary, delivered a major report at the Los Angeles County Convention of the Communist Party held July 10-11, 1948 [Ex. FO]. In the fall of 1948, Healey attended a Regional Convention of the Communist Party in Los Angeles (A. 92). In the summer of 1949, following a National Committee plenum in New York, Healey received a portable mimeograph machine designed for use in the Communist Underground (A. 64-68). In September, 1949, Healey addressed a Party meeting in Los Angeles where she was introduced as Chairman of the Los Angeles County Communist Party (A. 291-292). In January, 1950, Healey attended a Regional Meeting of the Communist Party in Los Angeles (A. 93-94). In the spring of 1950, Healey attended a *People's World* (see *supra*, p. 85) Circulation Drive Rally (A. 95-96). The evidence shows that Healey has occupied a position of responsibility in the

Los Angeles County Communist Party, either as Secretary or Chairman, from October, 1945, until April, 1951 [Exs. 641, 640, 645, 644, 643, 642].

"*Frank Carlson.*

"In 1935 Carlson was California State Director of the Young Communist League (A. 11, 246). In 1936 he attended underground meetings of the Los Angeles County Committee of the Young Communist League and instructed Young Communist League study groups in which he used Exhibit 266, *What Is to Be Done?* [Ex. 266], by V. I. Lenin, and said that in order to win the young people for the fight against fascism the Young Communist League would have to be dressed up and changed to make it look more like an American Organization; he discussed methods of doing this and said 'We must look to Lenin for the answers' (A. 244-245). At the Young Communist League Offices in 1936 Carlson led a discussion on how to build the Party youth press (A. 245-246). In 1936 or 1937, Carlson attended the National Convention of the Young Communist League in New York City [R. 6227]. In 1937 Carlson, a member of the State Committee of the Young Communist League, attended a State Committee meeting of the YCL at the Communist Party Headquarters in San Francisco (A. 246), and in September, 1938, he attended another State Board Meeting of the Young Communist League (A. 250).

"Carlson attended the State Convention of the Communist Party held in San Francisco in 1945 and from the end of 1945 through 1946 he had a desk in the California

State Headquarters of the Communist Party and attended State Board Meetings held in these headquarters where he also taught classes in Marxism (A. 358-365). In April, 1946, witness Hamlin was instructed by the San Diego County Communist Party organizer to contact Carlson at the headquarters of the Los Angeles County Communist Party when Hamlin went there on Party business [A. 30; R. 1346]. Later in the same year, Carlson met with the San Diego County Committee of the Communist Party in San Diego (A. 31). Appellant Yates testified that she, in collaboration with Carlson, prepared in 1946 a handbook for club officers in order to help them organize the work of their clubs [A. 388; Ex. MF].

[*For further details regarding this alleged incident see the section dealing with petitioner Yates, p.....,* *supra.*]

"By 1947 Carlson had been a member of the Communist Party for fourteen or fifteen years [R. 7421; Ex. FF; R. 4918; Ex. 730]. In April 1947, Carlson left San Francisco and became the State Secretary of the Communist Party in Wisconsin [A. 365, 280; Ex. 729] where he was introduced to a Communist meeting in Milwaukee as an organizer from the national committee of the Communist Party (A. 276). Carlson said he had been sent to Milwaukee to organize the Party and see that it became more militant (A. 277).

"In Milwaukee Carlson instructed the witness Estrada to buy the *Communist Manifesto* [Ex. 39], which he described as the bible of the Communist Party, *Problems of Leninism* [Ex. 146], *Foundations of Leninism* [Ex. 1], and the *History of the CPSU* [Ex. 28; A. 277-278; R.

6482-6484]. Carlson endeavored to have witness Estrada organize a chapter of the United Negro and Allied Veterans in Milwaukee, saying that such an organization would be necessary in the event of a revolution in the United States. Carlson stated that the Negroes in the North would have to be militant enough to guide the Negroes in the South and that the Party had ways of getting guns* [A. 277-278; Ex. 730]."

[*The witness' contemporaneous written report to the F.B.I., Exh. 730, purported to quote appellant in this reference as saying "Negroes in the South will have to be taught the communist way of living. (program which is now being carried on by the Communist Party, the C.I.O. and the American Federation of Labor) before they can receive fire arms in the event of revolutionary action by the fascists in that part of the country" (R. 7446; emphasis supplied).*]

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*"Q. Will you relate as nearly as you can the substance of what was said by Mr. Carlson to you while you were conversing with him? A. (Witness Estrada.) Well, after we had finished our dinner * * * then he went on to state that the Negroes, the Party had been helpful to the Negroes in the South. I asked him, 'In what way?' He says, well, the Negroes down there had received some pretty severe kicks and he related a case where 200 white men were chasing one Negro to lynch him, and they were met by 100 other Negroes armed, who represed their attack, the 200 white men's attack upon this one Negro. He said 'Therefore, you can see that the Party has been helpful to the Negro in the South.' I then asked him how did the people get guns, the Negro people down in the South get guns. He says, 'Well, the Party has methods of doing so.' Then he says, 'You know, I would like to have you organize a United Negro and Allied Veterans of America organization', he says, 'because it will be necessary in the event of a revolution in this country to overthrow this country by the Communist Party, that the Negro boys in the North will have to be militant enough to guide the Negro people in the South * * *' (A. 277-278.)

"In March, 1948, Carlson attended a functionaries meeting of the Los Angeles County Communist Party (A. 186). In October, 1949, he visited a session of the Marxist Institute where he was introduced as the 'County Organizer,' and where he listened to a session of the class (A. 84). Appellant Yates testified that during 1951 she held frequent meetings with Carlson in the Los Angeles headquarters of the Communist Party in conjunction with her duties as an official of the Party (A. 394-396).

"That Carlson was aware of the secret nature of the Communist Party is clear from his caution to witness Estrada not to inquire the names of people attending a meeting in 1947 (A. 279-280), and the fact that he was present during a four-hour interview of witness Scarletto concerning Scarletto's underground assignment in April, 1951 (A. 89-91, 104-105)."

Appendix D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U.S.C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government:

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U.S.C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U.S.C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. . . ."

18 U.S.C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be de-

prived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix E

It is the purpose of the attached charts to portray chronologically and graphically as to each petitioner every item of evidence connecting him with an office in the Party, Marxism-Leninism and advocacy of any kind, relating to revolutionary processes. Where content of a speech or article is not noted in the chart, it is either because the record does not reveal the content or it has no conceivable relationship to revolution. Revolution is not equated with force and violence. Every reference to revolution is listed, no matter how remote it may be from the concept of violence. It is each petitioner's contention that these charts reveal that the evidence is insufficient to establish his or her specific criminal intent or connection with the alleged conspiracy.

With respect to petitioner Yates, her own testimony construing Marxism-Leninism as not advocating violent overthrow of our government and setting forth her own adherence to the democratic processes is not included in the chart.

CARLSON		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1932—Became Member 1935—Calif. State Director and Member State Committee Y.C.L. 1937—Member State Comm. Y.C.L.	None	None	None	1936—Led study group using Lenin's works and said must look to Lenin for the answers and called for fight against fascism.	None.
1940-1944	None	"	"	"	None	"
1945	"	"	"	"	"	"
1946	"	"	"	"	Taught classes in Marxism (What said not in record)	"
1947	Organizer and State (Wis.) Sec'y	Said Party had methods of getting guns to Negroes who used them in self-defense against lynching attack; in event of rev. "to overthrow this country" Negroes in North will have to be militant enough to guide Negroes in South. (The actual statement as shown by contemporaneous FBI report referred to resistance to "revolutionary action by fascists" and witness explained he considered this similar to overthrow of U.S. govt.)	"	"	None	"
1948	None	None	"	"	"	"
1949	County Organizer	"	"	"	Visited Marxist Institute (What said not in record)	"
1950	None	"	"	"	None	"
1951	"	"	"	"	"	"

DOROTHY HEALEY CONNELLY		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1933—Member Y.C.L.	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	County Org. Sec'y	"	"	"	Urged "militant" future for the Party and re-education of all Marxists.	"
1946	County Org. Sec'y	"	"	"	None	"
1947	County Org. Sec'y	"	"	"	"	"
1948	County Org. Sec'y	"	"	"	"	"
1949	County Chairman	"	"	"	"	"
1950	None	"	"	"	"	"
1951	County Chairman	"	"	"	"	"

DOBBS

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1932-1945—Member Y.C.L. 1935—City Director Y.C.L. 1936—Member State Committee	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	City Labor Chairman, Sec'y and Director	"	"	"	"	"
1947	City Labor Chairman, Sec'y and Director	"	"	"	"	"
1948	City Labor Chairman, Sec'y and Director	"	"	"	At two meetings referred to Ex. 28, History of CPSU and compared revolutionary role of Pravda in Russian rev. with role of People's World.	"
1949	City Labor Chairman, Sec'y and Director	"	"	"	Spoke at Lenin Memorial meeting. Record silent on what said.	"
1950	County Org. Sec'y	"	"	"	None	"
1951	Undesignated County Officer	"	"	"	"	"

FOX

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
		(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Oth Than Utterances and Perso Use of Books
Pre-1940	1935—City Organizer	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	"	Said Party "revolutionary" and "wanted to see overthrow of lousy system" but time for militant action not yet arrived.	"	"	"	"
1947	Club Chairman	None	"	"	"	"
1948	Club Chairman and City Section Chairman	"	"	"	Maintained complete Little Lenin Library at his home.	"
1949	City Section Organizer	"	"	"	None	"
1950	None	"	"	"	"	"
1951	City Section Organizer	"	"	"	"	"

KUSNITZ

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	None	None	None	None	None	None
1940-1944	1943—City Section Organizer	"	"	"	"	"
1945	None	"	"	"	"	"
1946	"	"	"	"	"	Present at meeting when Pet. Schneiderman urged immediate Marxist training and said free elections here can only serve purposes of fascists.
1947	"	"	"	"	"	None
1948	"	"	"	"	"	"
1949	City Section Organizer and City Division Org. Sec'y	"	"	"	"	"
1950	None	"	"	"	"	"
1951	"	"	"	"	"	"

LAMBERT

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1935—Member responsible for security; member Central Committee	None	None	None	None	None
1940-1944	1942—District Financial Sec'y 1944—City Admin. Sec'y	"	"	"	"	"
1945	None	"	"	Mother Bloor, 83-yr. old woman, predicted violent revolution with blood flowing in streets and praised UN, Roosevelt and peace.	"	"
1946	Head State Security Committee	"	Petitioner Fox said Party "revolutionary", "Wanted to see overthrow of lousy system" but time for militant action not arrived yet.	None	"	"
1947	None	"	Pet. Schneiderman said change to socialism would be violent because Masters of Finance Capital would not permit majority to change peacefully.	None	"	"
1948	"	"	None	"	"	Present at meeting when Pet. Dobbs said People's World had a role similar to that of Pravda and referred to History of C.P.S.U. (Ex. 28).
1949	State Financial Sec'y and Chairman State Security Board	"	"	"	"	None
1950	None	"	Question asked by FBI agent, who then being expelled whether revolution by bullets instead of ballots being planned and one, Alexander, replied "Just what the hell do you think we are purging the party for.	"	"	"
1951	"	"	None	"	"	"

LIMA		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M.-L. Other Than Utterances and Personal Use of Books
Pre-1940	None	None	None	None	None	"
1940-1944	1940—Member	"	"	"	"	"
1945	City Field Organizer Member of National Committee	"	"	"	"	"
1946	None	"	"	"	"	"
1947	State Sec'y and Org. Sec'y	"	Pet. Schneiderman said change to socialism would be violent because masters of finance capital would not permit majority to change peacefully.	"	"	"
1948	None	"	None	"	"	"
1949	"	"	"	"	"	"
1950	County Regional Chairman	"	"	"	"	"
1951	None	"	"	"	"	"

SPECTOR

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1939—Then "pioneer leader" of Party 1936-40—County organizer, sec'y or chairman	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	"	"	"	"	Conducted classes and assigned reading material.	"
1947	"	"	"	"	Made criticism because of inadequate reading.	"
1948	"	"	"	"	None	"
1949	"	"	"	"	Announced as instructor on "The State"	"
1950	County Division Organizer	"	"	"	None	"
1951	None	"	"	"	"	"